



POLICY REPORT

# THE MARCH OF UNIVERSALITY?

## **RELIGION-BASED RESERVATIONS TO THE CORE UN TREATIES AND WHAT THEY TELL US ABOUT HUMAN RIGHTS AND UNIVERSALITY IN THE 21<sup>st</sup> CENTURY**

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# EXECUTIVE SUMMARY

The United Nations human rights treaties fulfil a central function in the global human rights promotion and protection system. By voluntarily acceding to those treaties, States bind themselves into a comprehensive framework of human rights obligations. Then, working in dialogue and cooperation with the Treaty Bodies set up to monitor and promote compliance with the treaties, States take steps over time to bring national laws, processes and practices into line with universal norms.

However, when acceding to international human rights treaties, States often enter 'reservations' that limit, either generally or partially, the scope of application of the treaty in domestic law. So, for example, a State may make a general reservation to only accept obligations under a treaty insofar as those obligations are compatible with the tenets of a given religion; or may make a partial reservation to limit the application of a certain article of a convention.

These reservations have a significant negative impact on the on-the-ground enjoyment of human rights. If a State does not consider itself fully bound by a treaty to which it is Party, or does not consider itself bound by a certain article(s) of that treaty, then it is unlikely to take the necessary steps, at domestic level, to fully respect, protect or promote the right(s) in question.

Between 2014-2016, the Universal Rights Group (URG) led a major international project to map all reservations to the core human rights conventions, and to better understand the extent and nature of these key checks on the universality of human rights. As part of the project, the URG was particularly interested in identifying and analysing reservations that are - or appear to be - motivated by doubts, on the part of the reserving State, as to the compatibility of the treaty in question with certain religious or belief systems.

URG's analysis found that questions over compatibility of treaties or treaty provisions with religious belief, doctrine or dogma, are by far the most frequent reason, justification or basis for States' decisions to enter reservations to the UN human rights treaties. Indeed, religion-based or religion-influenced reservations account for over 40% of all reservations to the core international human rights treaties.

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## A 'BAROMETER' OF UNIVERSALITY?

The practice of entering reservations to the UN human rights treaties and the validity of those reservations remain, in a legal sense, highly controversial. Politically too, the practice raises crucial questions about the universality of human rights, and conversely, about cultural and religious relativism.

If a given treaty, or article within a treaty, is the subject of a large number of reservations, it is clearly suggestive of a perceived incompatibility between the rights concerned and the cultural norms or religious sensibilities of certain States. The presence of reservations, in other words, reinforces the arguments of cultural relativists; while the withdrawal of reservations, or the decision of a certain State to accede to a convention without reservations in the first place, is a powerful indicator of 'the march of universality.'

A desire to win this argument - to demonstrate the inalienable and universal nature of human rights - explains the strong opposition, amongst many State officials, UN experts, NGO representatives, and academics, to reservations to the international human rights treaties.

However, another reading of reservations is that they can be a useful political tool - a means through which States can demonstrate their commitment to human rights by acceding to a treaty even where they may face strong domestic opposition to some of the treaty's individual provisions.

Thus, through reservations, the international system is able to ensure the fulfilment of the obligations (i.e. the State only accepts those obligations it realistically intends to fulfil), while binding a State into a process through which it can begin the process of implementing the obligations it accepts, in cooperation with the relevant Treaty Body. This, in turn, enhances the likelihood of the State improving human rights policy and practice at the national level, and, eventually, at the international level (i.e. by subsequently withdrawing its reservations and/or ratifying other conventions). Proponents of this latter view therefore see reservations as part of a necessary political 'trade-off' or as a 'necessary evil.'

## RELIGION-BASED RESERVATIONS

Reservations to the core human rights treaties, entered at the time of ratification, are extremely widespread and, because they have direct implications for a State's obligations under international law, have real and immediate consequences for the level of protection afforded to human rights at the domestic level.

Reservations based on religion, belief or religious tradition feature, are present to varying degrees, in all seven of the core UN human rights conventions.

The treaties that have attracted both the highest number of overall normative reservations and, within that picture, the highest number of religion-based reservations, are CEDAW (440 reservations, over 60% of which are inspired by religion or belief) and the CRC (425 reservations, almost 50% of which are religion-based). The ICCPR has the third largest total number of reservations (354), but, unlike the CEDAW and CRC, only a small number of those (10%) are motivated by religious considerations. Muslim-majority States are most likely to enter religion-based reservations, however they are far from alone: such reservations have also been entered by Catholic-majority States from Western Europe, Eastern Europe, Latin America and the Pacific, as well as by Jewish-majority, Hindu-majority, and Buddhist-majority countries from Asia and the Middle East.

URG's analysis reveals two particular patterns. First, perhaps not unexpectedly, there is a close relationship between the issue area of a treaty and the prevalence of reservations based on religion. Treaties that penetrate more squarely into societal issues and/or the private sphere, for example, the CEDAW, CRC and CRPD, have attracted most religion-based reservations. Reservations to the CAT are the possible exception to this pattern. Here, religion-based reservations deal mainly with different religious-cultural views on punishment.

Second, there is a correlation between the style of treaties and the prevalence of religion-based reservations. The CEDAW, CRC, CAT and CRPD are often regarded as 'implementing treaties' as they include more detailed provisions with regard to the general ideals and principles already present in the ICCPR, ICE-

SCR and Universal Declaration of Human Rights. Whilst States have not entered any reservations to the general ideas of equality of between men and women in the ICCPR and the ICESCR, for example, more granular pronouncements of the same ideals in the CEDAW — i.e. equality in the family sphere — have attracted a significant number of religion-based reservations.

If one looks at which articles and provisions of the CEDAW and CRC have attracted the most religion-based reservations, it is again clear that any questions touching upon society, and the traditional roles of men, women and children therein, act as a 'lightening rod' for such reservations.

For example, the provisions of the CEDAW that have historically attracted the most religion-based reservations are those that aim to regulate the equal rights of men and women in the family (article 16). Under article 16, the most reserved sub-provisions are those that concern equality rights between men and women during marriage and after its dissolution, followed by sub-provisions that grant the same personal rights to husbands and wives (i.e. the right to choose a family name, a profession and an occupation), equal rights and responsibilities for men and women with regard to guardianship, wardship, trusteeship and the adoption of children, and equal rights and responsibilities as parents.

Regarding the CRC, historically, most religion-based reservations have been placed on article 21, which regulates the adoption of children (this article has received 46 reservations - some of them subsequently withdrawn - entered by ten States).

## WITHDRAWAL OF RESERVATIONS

In a trend with important positive implications for the universality of human rights and the determination of States to strengthen their commitments and obligations under international human rights law, between 1991 and 2012, nine States withdrew religion-based general reservations to the core UN human rights treaties (all but two of the lifting States are members of the Organisation of Islamic Conference), and 19 States lifted religion-based specific reservations (17 OIC States, plus Mauritius and Singapore).

With one exception, all lifted general reservations related to the CRC (three cases) and the CEDAW (5 cases).

Regarding reservations to specific articles, 62 were lifted from the CRC, 43 from the CEDAW, 9 from the CAT, and 4 from the ICCPR.

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## THE POLITICS OF RESERVATIONS

Reservations are often presented and analysed from a purely legal perspective; and yet they are inherently and acutely political. They represent the outward, external manifestation of deeply sensitive political questions related to the relationship between universal human rights norms and national/local culture, religious beliefs and traditions. They also reflect the final settlement or outward expression of complex domestic debates between relevant stakeholders (different government ministries, lawyers, religious leaders, NGOs) about how best to 'promote and protect all [universal] human rights and fundamental freedoms,' while bearing in mind 'the significance of national and regional particularities and various historical, cultural and religious backgrounds.'

Thus, the focus of any useful analysis of reservations should incorporate the domestic experiences of States: what were the main domestic political dynamics that led a State to ratify a treaty but at the same time submit reservations to one or more articles of that treaty; and - crucially - in cases where a State was able, subsequently, to withdraw that reservation, what were the domestic political dynamics which made that possible? To inform such an analysis, this Policy Report presents four case studies focusing on the decisions to enter and/or lift religion-based reservations in: Indonesia, Morocco, Pakistan, and Tunisia.

Based on this analysis of domestic political realities and dynamics, it is then possible to ask a second key question: how can the international community help promote or replicate those good domestic practices - practices that allowed States to review the necessity of their reservations and come to the conclusions that they were no longer needed?

One key lesson that can be gleaned from the case studies is that a decision to withdraw a reservation, including religion-based reservations, must - like the decision to enter them in the first place - be driven by domestic political dynamics, debate and reform. The decision cannot and should not be imposed from above. That is not to say that the international community should not play a role. It should. But that role must be to encourage and press the relevant State to begin or intensify a process of domestic political discourse, debate, reflection and reform - involving all relevant domestic stakeholders and the general public - in order to create the conditions for a possible withdrawal. Indeed, any attempt to force or pressurise a country to withdraw a reservation, especially if that reservation touches upon sensitive matters of religion and tradition, and has the support of a majority of the population, is likely to be counter-productive.

This Policy Report concludes by offering a number of recommendations to all parts of the UN human rights system, including:

- All States should move to sign and ratify the core human rights conventions. Doing so demonstrates an important political commitment to universal human rights norms, and opens the possibility of working with, and receiving technical assistance and capacity-building support from, the UN Treaty Bodies and the wider international human rights system, in order to gradually bring domestic laws and practices into line with those norms.
- Where a political determination to sign and ratify a human rights treaty is held back by concerns, on the part of some domestic constituencies, about certain provisions of that treaty; the State may consider entering specific reservations, providing they are not contrary to the treaty's object and purpose.
- States should avoid entering general (or blanket) reservations to the UN human rights treaties as a whole. Such reservations make it impossible to monitor or credibly verify a State's compliance with the treaties.
- Reserving States should keep their reservations under active (re)-consideration. As part of that, States should initiate processes of domestic consultation, reflection and, potentially, reform, that may, over time, render any reservations unnecessary or obsolete.

- During their interactive dialogues with States Parties, and in their concluding observations, Treaty Bodies should engage in a substantive exchange about the justification of standing reservations, and the relationship between relevant treaty provisions and the contemporary domestic *status quo* as it pertains to relevant issues of religion, belief, culture or tradition.
- Based on that exchange, Treaty Bodies should build on existing good practice by encouraging and lending support to domestic processes of consultation, reflection and, potentially, reform; and by referring States Parties to relevant cases studies (e.g. other States Parties that have successfully reviewed and, perhaps, lifted reservations).
- Reviewing States under the UPR should carefully consider all three UPR reports and tailor recommendations to the prevailing domestic situation and domestic religious or cultural sensitivities. Recommendations may also be more effective if they focus on process - i.e. calling on the State under review to begin a process of domestic consultations or awareness-raising - rather than the final desired outcome (i.e. lifting of reservations).
- As part of efforts to reform the delivery of the Human Rights Council's mandate under agenda item 10, member States should establish inter-sessional platforms, in Geneva and regionally, whereon States and other national stakeholders (especially country-level practitioners) can present national experiences and good practice (e.g. the lifting of reservations, reform of a country's family code) and, where appropriate, can request international support for further progress.

# INTRODUCTION

The UN human rights treaties fulfil a central function in the global human rights promotion and protection system. By voluntarily acceding to these treaties, States bind themselves into a comprehensive framework of human rights obligations. Then, working in dialogue and cooperation with the Treaty Bodies, set up to monitor and promote compliance with the treaties, States take steps over time to bring national laws, processes and practices into line with universal norms.

However, when ratifying or acceding to conventions, States often enter 'reservations' that limit, either generally or partially, the scope of application of the treaty in domestic law. So, for example, a State may make a general reservation to only accept obligations under a treaty insofar as those obligations are compatible with the tenets of a given religion; or may make a partial reservation to limit the application of a certain article of a convention.

Reservations have a significant negative impact on the on-the-ground enjoyment of human rights. If a State does not consider itself *fully* bound by a treaty to which it is Party, or does not consider itself bound by a certain article(s) of that treaty, then it is unlikely to take the necessary steps, at national level, to fully respect, protect or promote the right(s) in question; with the result that the decision to ratify may be seen as something of an 'empty' gesture.

Between 2014-2016, the Universal Rights Group (URG) led a major international project to map all reservations to the core human rights treaties, and to better understand the extent and nature of these key checks on the universality of human rights. As part of the project, the URG was particularly interested in identifying and analysing reservations that are - or appear to be - motivated by doubts, on the part of the reserving State, as to the compatibility of the treaty in question with certain religious or belief systems (see section II below).

In addition to this mapping exercise, URG with partners, including Koç University in Turkey and the Global Ethics Institute of the University of Tübingen in Germany,<sup>1</sup> and with the kind support of Federal Foreign Office of Germany, organised two consultation meetings with reserving States, representatives of the Office of the High Commissioner for Human Rights (OHCHR),

NGOs, and academics: the first in Tübingen from 17-18 February 2015, and the second in Istanbul from 22-23 February 2015. The URG also hosted two informal policy dialogues with reserving States in 2015 and 2016, and a side event during the March 2015 session of the Human Rights Council. Finally, URG interviewed a wide cross-section of States that have entered and/or withdrawn reservations to the core human rights treaties. The aim of these events and interviews was to understand why States take the decision to enter reservations at the time of ratification, and also why and how some of them have subsequently been able to revisit that decision.

The results of the mapping exercise, the consultation meetings, policy dialogues, and interviews are presented in this Policy Report.

URG's analysis has discovered that questions over the compatibility of treaties or treaty provisions with religious belief, doctrine or dogma, are by far the most frequent reason, justification or basis for States' decisions to enter reservations to the core human rights treaties. According to the mapping exercise undertaken by URG, religion-based or religion-influenced reservations account for over 40% of all reservations to the core human rights treaties.

Religion-based reservations have been entered to all seven of the core conventions: the International Covenant on the Elimination of all forms of Racial Discrimination (ICERD); the International Convention on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); the Convention on the Rights of Persons with Disabilities (CRPD); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>2</sup>

One commonly held misconception, which arose repeatedly during interviews and policy dialogues conducted for this Policy Report, is that religion-based reservations only affect member States of the Organisation for Islamic Cooperation (OIC). In fact, States that have entered such reservations hail from all regions of the world, are representative of a variety of religious belief systems, and may either maintain an established State religion or be secular in nature.





Members of the Commission on the Status of Women, 1948

URG's project on religion-based reservations and this Policy Report aim to, *inter alia*:

- Map all reservations to the core conventions, analyse their extent and character, and track changes over time. This mapping has important implications for measuring and understanding the universality of human rights.
- Identify and map those reservations based upon, or clearly influenced by, religious belief or doctrine - again, with important implications for questions around the compatibility of religion and human rights, and for universality.
- Analyse the extent and nature of religion-based reservations - which conventions and articles are most affected; which States enter the most religion-based reservations, and why?
- Show the on-the-ground implications of religion-based reservations for individual rights-holders.
- Understand the political imperatives behind States' decisions to enter reservations and, conversely, the political dynamics behind decisions of some States to subsequently withdraw them.
- Learn lessons from those experiences, and apply those lessons in order to promote a reconsideration of the necessity and desirability of reservations, on the part of States.

The report is divided into four parts. Part I concerns the general framework of reservations to international treaties. Part II offers a global analysis of the extent and nature of religion-based reservations to the UN human rights treaties, showing patterns, seeking to understand political dynamics, and drawing lessons *vis-à-vis* the universality of human rights. Part III presents four specific case studies, highlighting the national and international contexts that influence State practice *vis-à-vis* religion-based reservations. Finally, Part IV offers recommendations with regard to religion-based reservations to key stakeholders, namely States, Treaty Bodies, national human rights institutions (NHRIs) and NGOs.

# PART I

## RESERVATIONS TO INTERNATIONAL TREATIES

According to article 2 of the Vienna Convention on the Law of Treaties, a reservation is 'a unilateral act by which a State excludes or modifies the legal effect of a treaty to which it is Party.'

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### THE BASIS OF TREATY RESERVATIONS

In 1951, the International Court of Justice (ICJ), through an advisory opinion on reservations to the Genocide Convention, noted that a flexible approach was required to secure the worldwide enforcement of international conventions adopted by decisions of majorities; especially in cases where a number of States (i.e. not all States) developed a new treaty designed to further the interests of the whole of the international community (i.e. as opposed to one designed to address a particular territorially-defined issue).<sup>3</sup> In its opinion, the ICJ stated that the absence of an article in the relevant treaty permitting reservations does not imply that these restrictive acts are prohibited under the convention. However, it also affirmed that reservations have to be consistent with this treaty's 'object and purpose' in order to be valid.

These principles, set out by the ICJ, were later codified in the Vienna Convention on the Law of treaties of 1969 (VCLT), which, *inter alia*, sought to regulate under what conditions a State may enter a reservation to a treaty, and what the consequences of reservations are. Under the VCLT, States may enter reservations

to international treaties provided that these are not expressly prohibited or restricted by the corresponding instrument, and provided that they are not contrary to the treaty's object and purpose. Notwithstanding, the VCLT is based on the reciprocal consent principle, meaning that when a State restricts its obligations by entering a reservation, the other Parties to the treaty are free to either accept or reject that reservation. Under the VCLT, the legal consequences of an objection are clarified to some extent: objecting States may, refuse to engage in a treaty relationship with the reserving State. However, the VCLT does not clarify the legal status of reservations that have been subject to an objection if the treaty is in force between the parties.<sup>4</sup>

In order to address such *lacunae*, in 1993 the International Law Commission (ILC) included the topic of reservations to treaties on its agenda, with the purpose of clarifying and further developing the international legal regime. In 1994, the ILC appointed Professor Allain Pellet as Special Rapporteur on law and practice relating to reservations to treaties. Over the next 18 years, Professor Pellet conducted an extensive study of the topic, presenting no less than 16 individual reports. These reports served as the basis for a Guide to Practice on Reservations to treaties (ILC Guidelines) adopted by the ILC in 2011.

The ILC Guidelines are a non-binding 'soft law' instrument designed to help States by clarifying and summarising relevant aspects of the international legal framework for reservations. It was conceived, from the beginning, as a soft-law instrument

because the Special Rapporteur recognised that the complexity of the issue of reservations meant it would be futile to attempt to develop a set of binding rules.

Alongside and contributing to the efforts of Professor Pellet, in 1998 the UN Sub-Commission on the prevention of discrimination and the protection of minorities (the Sub-Commission) appointed one of its members, Professor Françoise Hampson, to also consider questions around the international legal regime for reservations, though in her case with a particular focus on reservations to the international human rights treaties. After reviewing those reservations, Professor Hampson concluded that neither the formulation of reservations, nor objections to them by other States, provided clarity about whether the reservations were compatible with the object and the purpose of the treaties. (See below for further consideration of this - still contested - issue).<sup>5</sup>

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## RESERVATIONS TO THE HUMAN RIGHTS TREATIES: A CONTESTED TOPIC

The applicable legal regime for reservations to human rights treaties remains a matter of some debate. That debate has mainly centred on the question of whether such reservations should be governed by a special regime or (like reservations to other kinds of treaties) by general international law (particularly the VCLT).

On the one hand, some commentators argue that the human rights conventions represent a particular or special case because Parties to these treaties have, as the ICJ stated, 'a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention,'<sup>6</sup> such as, for example, protecting human dignity. Following this line of reasoning, the Human Rights Committee (the Treaty Body established to promote compliance with the ICCPR) has emphasised that while 'treaties that are mere exchanges of obligations between states allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.'<sup>7</sup>

Those who embrace this stance argue, therefore, that reservations to human rights treaties affect the population of the re-

serving country more than they impact other States Parties. Accordingly, they maintain that the VCLT is not adequate in the case of the human rights treaties, as a reciprocal restriction to an obligation will not only serve little purpose, but might also result in a lessening of protection for individuals in the States Parties' territories.<sup>8</sup>

Some go even further, arguing that the application of the 'VCLT regime' might actively undermine the integrity of the human rights treaties, and therefore the realisation of fundamental rights and the coherence of the international human rights framework.<sup>9</sup> According to such commentators, the particularities of human rights treaties require a special reservations framework.

Others, including Professors Hampson and Pellet, instead argue that human rights treaties, despite having certain specificities, are no different to any other international convention. The effects of human rights treaties on the rights of individuals within a given State's jurisdiction are a natural consequence of the obligations the States have acquired towards their peers. Moreover, according to this view, the VCLT and its 'object and purpose' test is flexible enough to accommodate the particularities of the human rights treaties; while the reciprocity element is neither absent from human rights treaties, nor is it essential for the correct application of the VCLT.<sup>10</sup> Thus, human rights treaties should be governed by the same rules and principles (i.e. VCLT) that apply to any other international covenant.

In practice, it is today widely accepted that the VCLT regime applies 'by default' to all human rights treaties - unless the Parties to a specific convention agree otherwise. It is thus open to the drafters of international human rights treaties to pre-arrange the reservations regime, either by excluding them completely, expressly permitting them, or limiting their scope by imposing strict requirements.

For example, the Optional Protocol to the CEDAW and the Optional Protocol to the CAT have expressly prohibited reservations. The CEDAW, ICERD, CRPD and its Optional Protocol, CRMW, and CRC, contain provisions affirming the 'object and purpose' criterion. The ICCPR and ICESCR, along with their Optional Protocols, and the CRC's Optional Protocols, are silent on the matter, while the CAT only mentions reservations in the context of the competences of the Committee. Consequently, these latter treaties (the ICCPR, CESC, and CAT) are governed by default, by the general principles of international law - i.e. the VCLT.

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## TYPES OF RESERVATIONS

The VCLT defines a reservation as any statement, however named (e.g. reservation, declaration or interpretative statement), that aims to restrict - either totally or partially - the scope of the application of a given treaty.

So, for example, declarations<sup>11</sup> with restrictive effects shall be considered reservations and other States Parties may object to them. Such is the case with Singapore's declaration in the context of articles 19 and 37 of the CRC, which, *inter alia*, Belgium objected to on the grounds that it is contrary to the object and purpose of the Convention.

In practice, reservations to the provisions of human rights treaties come in two forms: general or specific.

General reservations affect the application of the treaty as a whole, thereby limiting or modifying all the obligations acquired by the reserving State under the instrument.

For example, the general reservation of Saudi Arabia to the CEDAW reads:

*'In the case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.'*

Specific reservations, on the other hand, focus on particular articles or paragraphs of the relevant treaty. Consequently, only certain obligations, as acquired by the State, are limited or modified, leaving the remaining commitments (i.e. those that are not included within the scope of the reservation) intact. For instance, a reservation entered by the Principality of Monaco to the CRC reads:

*'The Principality of Monaco does not consider itself bound by Article 16, paragraph 1 (g), regarding the right to choose one's surname.'*

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## RESERVATIONS: KEY LEGAL PRINCIPLES

### PERMISSIBILITY OF RESERVATIONS

States may formulate reservations only when 'signing, ratifying, formally confirming, accepting, approving or acceding to a treaty.'<sup>12</sup> As mentioned above, reservations, in order to be valid, must not be prohibited by the relevant convention, nor should they contravene its 'object and purpose.'<sup>13</sup> The ILC Guidelines offer important guidance on what types of reservations may be incompatible with the object and the purpose of a treaty. Guideline 3.1.5 states:

*'A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the raison d'être of the treaty.'*<sup>14</sup>

Based on this guidance, reservations that are vague or general are considered to be contrary to the object and purpose of the relevant treaty - and thus impermissible - because their drafting makes it impossible to assess their compatibility with the object and purpose of said treaty.<sup>15</sup>

In addition to taking issue with compatibility of vague reservations with the 'object and purpose' criterion, the ILC Guidelines also put forward additional considerations to help assess permissibility, including that reservations must not: contradict essential clauses of the treaty; affect the effectiveness of the convention;<sup>16</sup> concern rights from which no derogation is permissible;<sup>17</sup> or compromise the general tenour or integrity of a treaty by prioritising the Party's internal laws.<sup>18</sup>

The VCLT does not establish the consequences or effects of impermissible reservations, merely stating that Parties may not enter reservations that are against the object and the purpose of a treaty. As a consequence, the status of such reservations has become a keenly debated topic. Today, there is broad agreement that impermissible reservations must be considered null and void and, thus, the reserving Party should be considered bound by the whole of the treaty. However, if it is established that the reservation was a *conditio sine qua non* for the State's consent to be bound by the treaty, the State may withdraw from the relevant convention.

A further related question is: which entities can authoritatively declare a reservation to be against the object and the purpose of a treaty, other than States themselves? This, again, is a matter of on-going debate. For example, whereas the European Court of Human Rights has abrogated itself of the authority to exclude reservations that it considers to be against the object and purpose of the European Convention on Human Rights<sup>19</sup> [see the case *Belios vs. Switzerland*,<sup>20</sup>] when the UN Human Rights Committee claimed similar powers in 1994 [with General Comment 24,<sup>21</sup>] a number of States (e.g. France, UK and US) objected.

## JUSTIFICATION OF RESERVATIONS

When entering a reservation, States 'should, to the extent possible,'<sup>22</sup> provide a statement of the reasons that have motivated such a step.

In practice, there are many reasons why States enter reservations to the human rights treaties. International relations and politics as well as domestic political, cultural and economic interests can play a role. Some States enter reservations because it is not plausible or desirable for them (for different reasons) to change their domestic legislation, or to accommodate their local situation within the normative framework provided by the obligations and standards imposed by the relevant convention.

For example, Zambia presented a reservation to the CESCR's provision on universal education arguing that 'problems of implementation, and particularly the financial implications'<sup>23</sup> of such an article made it impossible for the country to guarantee its full compliance with the Convention's provisions (which include, *inter alia*, providing free and universal primary education).

Similarly, Malta presented a reservation to the same provision of the same Convention, with the justification that 'the population of Malta is overwhelmingly Roman Catholic, [and thus] it is difficult also in view of limited financial and human resources, to provide such education in accordance with a particular religious or moral belief in cases of small groups, which cases are very exceptional in Malta.'

States might also enact reservations to adapt international conventions to their domestic legal and political circumstances in matters that are usually of national importance and interest. For instance, Croatia presented the following reservation to the CRC:

*'The Republic of Croatia reserves the right not to apply paragraph 1 of article 9 of the Convention since the internal legislation of the Republic of Croatia provides for the right of competent authorities (Centres for Social Work) to determine on separation of a child from his/her parents without a previous judicial review.'*

## OBJECTIONS

Parties (States or international organisations) to a given treaty can either accept or object to the reservations presented by another Party. In the first case, the Parties may express their support in a written communication (stating acceptance) or remain silent for a twelve-month period following the date of the tabling of the reservation (i.e. tacit approval).<sup>24</sup>

Where a Party opposes a reservation, it is entitled to object to the said act, regardless of its permissibility. The purpose of such an objection is to request the withdrawal or modification of the reservation in question, or to express opposition to its intended effects. The tabling of objections does not, however, mean that the reservation is legally impermissible. Indeed, because the existence of an objection does not affect the obligations of a reserving State, some consider them to be, from a purely legal perspective, largely 'futile' gestures.<sup>25</sup> This may explain why, in practice, relatively few States take it upon themselves to object to reservations.

An objection can, in theory, prevent a reserving State from becoming a Party to the relevant treaty - when the objecting State expressly affirms its will to exclude the entry into force of the agreement between both Parties. However, this situation has not yet arisen in the context of the UN human rights treaties.

## WITHDRAWAL

If the presence of reservations - no matter how politically useful they may be - offers a clue as the location of the contemporary boundaries between universal norms and local traditions, values, and beliefs; the withdrawal of such reservations is an important indicator of the movement of that boundary - of the expansion (or 'march') of universality.

When a State decides that there is no longer any incompatibility between its national or local traditions, values or beliefs, and universal human rights norms, it may choose to withdraw, in whole or in part, its reservation to a particular treaty. Factors that may drive such a change are considered in Part III of this report.

Indeed, States are actively encouraged to periodically reconsider reservations and to withdraw them when deemed appropriate.<sup>26</sup> The ILC's Guidelines recommend that all States undertake such a periodic review and consider 'withdrawing those [reservations] which no longer serve their purpose.' Similarly, the 1993 Vienna Declaration and Programme of Action urges all States to 'regularly review any reservations with a view to withdrawing them.'<sup>27</sup>

## A 'BAROMETER OF UNIVERSALITY'

The practice of entering reservations to the international human rights treaties remains highly controversial. In addition to, and linked with the debate around the relevant legal regime for determining permissibility, the practice of entering reservations raises crucial questions about the universality of human rights, and conversely, about cultural and religious relativism.<sup>28</sup>

Operative paragraph 5 of the Vienna Declaration and Programme of Action states that:

*'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'*

With that one article, the international community neatly delineated the contours of the crucial debate over the universality of human rights.

On the one hand, the Vienna Declaration makes clear that, 'all human rights are universal, indivisible and interdependent and interrelated.' Yet, on the other hand, it also recognises that, in promoting and protecting those rights (i.e. applying those rights) 'national and regional particularities and various historical, cultural and religious backgrounds *must* be borne in mind.'

So are the rights enumerated in the Universal Declaration of Human Rights, the two covenants and the various international conventions truly universal (i.e. they apply equally to everyone,

everywhere), or do they belong more to some cultures, societies, and religious belief systems than to others?

This question has, of course, led to a wide-ranging and sometimes acrimonious debate between those who argue that human rights are universal, and those (often labelled as 'cultural relativists') who question whether anything in our pluri-cultural, multi-polar world can truly be said to be universal, and instead argue that human rights is an essentially Western concept that ignores the very different cultural, economic, religious and political realities of other parts of the world.

These philosophical differences have very practical implications. Some commentators from developing countries argue that certain 'human rights' are simply not relevant to their societies - the right, for instance, to political pluralism, the right to paid vacations, the rights of women, including sexual and reproductive rights, and non-discrimination on the grounds of sexual orientation or gender identity. While others, especially right-wing politicians and polemicists in developed countries, argue that certain religious belief systems (e.g. Islam) are somehow inherently incompatible with 'universal' human rights, and use that argument as a way to denigrate or stigmatise adherents of the faith(s) in question.

The reality, of course, is somewhat less polarised - less 'black and white' - than these and other antagonists would have us believe. In fact, all UN member States accept the Universal Declaration of Human Rights and are committed, rhetorically at least, to the gradual ratification of (most, if not all) the international conventions, and to pursue 'the effective enjoyment by all of all human rights, civil, political, economic, social and cultural rights, including the right to development.'<sup>29</sup>

However, governments also, in many cases (and certainly not only in Muslim majority States), recognise that domestic 'traditional values,' religious beliefs and sensitivities, and cultural norms, mean that society, as a whole, may not be 'ready' for the full implementation of all the rights and freedoms set down in the International Bill of Rights. While a State, for example, may be committed to the elimination of discrimination against women and therefore may wish to sign and accede to the CEDAW, the government may nonetheless be aware that some important domestic constituencies would vociferously oppose certain individual provisions of the treaty (e.g. on inheritance).



This, in turn, explains the important role of reservations in international human rights law. It also shows why reservations offer an invaluable barometer of the universality of human rights. If a given treaty, or article within a treaty, is the subject of a large number of reservations, it is clearly suggestive of a perceived incompatibility between the rights concerned, and the cultural norms or religious sensibilities of certain States. The presence of reservations, in other words, reinforces the arguments of cultural relativists; while the withdrawal of reservations, or the decision of a certain State to accede to a convention without reservations in the first place, is a powerful indicator of 'the march of universality.'

## POLITICAL UTILITY

A desire to win this argument, to demonstrate the inalienable and universal nature of human rights, explains the strong opposition, amongst many State officials, UN experts, NGO representatives, and academics, to reservations to the international human rights treaties.

However, another reading of reservations is that they are a useful political tool - a means through which States can demonstrate their commitment to human rights by acceding to a treaty, even where they may face domestic opposition to some of the treaty's individual provisions. As a Western diplomat noted during the consultation meeting in Istanbul: 'reservations are essentially a compromise between those parts of the State that want to sign a convention, and those that don't - they are a tool of political expediency.'<sup>30</sup>

Thus, through reservations, the international system is able to maintain the 'integrity of obligations' (i.e. the State only accepts those obligations it realistically intends to fulfil), while binding the State into a process through which it can begin the process of implementing the obligations it accepts, in cooperation with the relevant Treaty Body. This, in turn, enhances the likelihood of the State improving human rights policy and practice at both the national level, and, eventually, at the international level (i.e. by subsequently withdrawing its reservations and/or ratifying other conventions). Proponents of this latter view, therefore see reservations as part of a necessary political 'trade-off' or as a 'necessary evil.'<sup>31</sup>

In its General Comment 24,<sup>32</sup> the Human Rights Committee reflected on this duality - on the apparent contradiction between reservations as an obstacle to, but also, in the long-term, as an

enabler of universality. In its General Comment, the Committee explained that:

*'The possibility of entering reservations may encourage states which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable states to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that states accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.'*

## PART II.

# RELIGION-BASED RESERVATIONS TO INTERNATIONAL HUMAN RIGHTS TREATIES

Since the adoption of the core human rights conventions, the number of States choosing to ratify, and thus become Party to those treaties, has grown exponentially (see Figure 1). Today, from a total of 193 UN member States (plus 4 non-member States): 196 are Party to the Convention on the Rights of the Child (CRC); 189 are Party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); 178 are Party to the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD); 173 are Party to the Convention on the Rights of Persons with Disabilities (CRPD); 169 are Party to the International Covenant on Civil and Political Rights (ICCPR); 165 are Party to the International Covenant on Economic, Social and Cultural Rights (ICESCR); and 161 are Party to the Convention against Torture (CAT).

Yet, as noted in Part I of this report, these figures, which appear to show 'the march of universality' (at least in terms of States' recognition of and commitment to - if not yet full domestic compliance with - universal norms), are somewhat misleading in that many States have entered reservations limiting their obligations under important parts of those conventions. These reservations are a useful means of understanding and plotting the boundary between universal human rights and 'national and regional particularities and various historical, cultural and religious backgrounds.'<sup>33</sup>

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## RELIGION-BASED RESERVATIONS

Reservations to the core human rights conventions, made at the time of ratification, are extremely widespread and, because they have direct implications for a State's obligations under international law, they have real and immediate consequences for the level of protection afforded to human rights at domestic level. To offer but one example, over 40 States have entered either general reservations to the CEDAW (there are around 15 such general reservations) or article-specific reservations (more than 400) - with clear implications for the rights of women in those countries.

Yet to date, with one or two notable exceptions (e.g. the final working Paper of Francois Hampson (2004) for the UN Sub-Commission on 'Reservations to Human Rights treaties,')<sup>34</sup> there has been no concerted effort to measure, analyse and understand those reservations.

To fill this gap, between October 2014 and November 2016, the Universal Rights Group undertook a major data gathering and data analysis exercise, with the goal of mapping all reservations to all seven core human rights treaties.

The broad results of that mapping exercise are presented in Figures 1 and 8.

As well as identifying such broad patterns, a key goal of the mapping exercise was to understand the prevalence of religion or belief as a rationale/justification for reservations to the core conventions. Religion or belief was chosen due to its central importance in contemporary debates about universality and cultural relativism

### METHODOLOGICAL CHALLENGES

There are two principal methodological challenges involved in identifying, counting and mapping reservations 'based on religion.'



First, there is the challenge of establishing whether a reservation is based on religion or not. Defining a normative reservation based on religion or belief is no easy task. In most if not all States, religion, tradition, culture and customs have become deeply inter-connected and mutually interdependent. The reaction of one Western diplomat during the Istanbul consultation meeting: that 'our reservation [to CEDAW] is not about religion, it is about ethics,' is representative of views of many State representatives interviewed for this Policy Report. Likewise, in most if not all States, religion and tradition have permeated deeply into the domestic legal system, even if the constitution is nominally secular. In other countries, the constitution officially recognises a State religion, meaning any reservation that references that constitution could be considered to be, in effect, a religion-based reservation. Other States do not explicitly mention religion or belief in their reservations, but do reference local customary rules that are implicitly informed by religious precepts.

For the purposes of this report, URG adopted a broad definition and approach. Our counting protocol takes into account both an expressive approach to religion adopted by States themselves, and a reasonable presumptive approach in cases where the State does not expressly indicate that the motivation behind a reservation is wholly or partly religious.

Under this chosen methodology, the URG considers a reservation to be based on religion when:

- The reservation *explicitly* refers to a religion either as a stand-alone normative order or as part of the constitution or domestic law.<sup>35</sup>
- The reservation is based on domestic law or constitutional law without *explicit* reference to religion, but religion is *explicitly* the main source of legislation (i.e. reservations based on family law or criminal procedural law that are themselves explicitly based on precepts of religious rules).
- The reservation is based on domestic law without direct reference to religion, but there is a strong presumption, beyond reasonable doubt, that religion is implicitly the main source of legislation.<sup>36</sup>

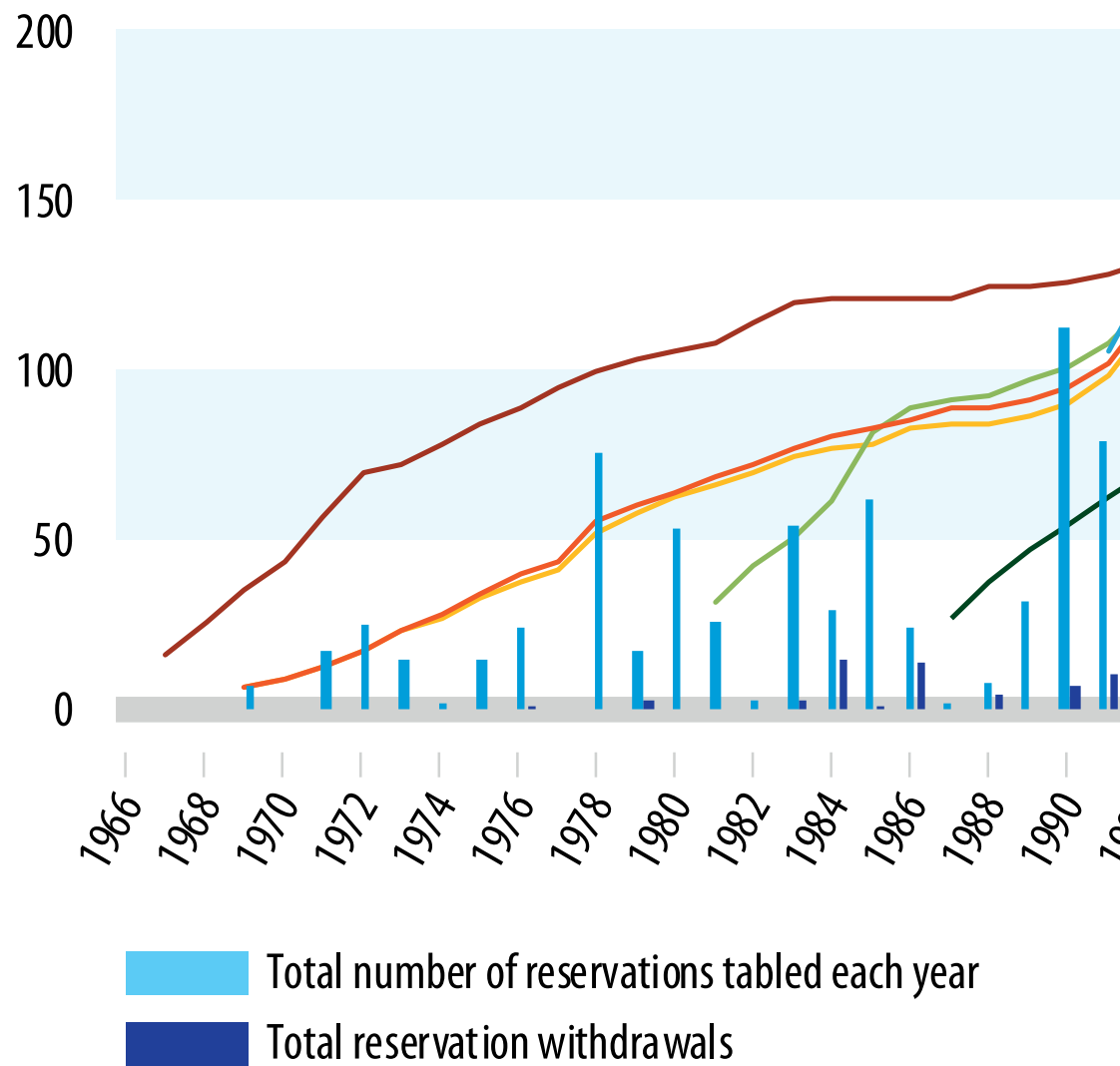
- The reservation is based on customs or traditions, but there is a reasonable connection between customs and traditions and the religions practiced in those States.<sup>37</sup>

Second, there is the challenge of counting reservations. If, for example, a State enters a single reservation to a particular treaty article that has multiple sub-provisions, then does that count as one reservation or more? As an illustration of this point, CEDAW article 16 (the most reserved provision of all UN human rights treaties) concerning the rights of women in family and marriage, has two sub-paragraphs and, under sub-paragraph 16 (1), eight sub-provisions. A State may only extend one reservation to article 16, yet that reservation affects that State's obligations under both sub-paragraphs and all sub-provisions. Reserving States have mixed practices with regard to clarifying whether they are applying a reservation to a provision of an article or to the article as a whole. In the latter case, for the purposes of this report, we assume that the State is intending to make a reservation to all provisions of the article.<sup>38</sup>

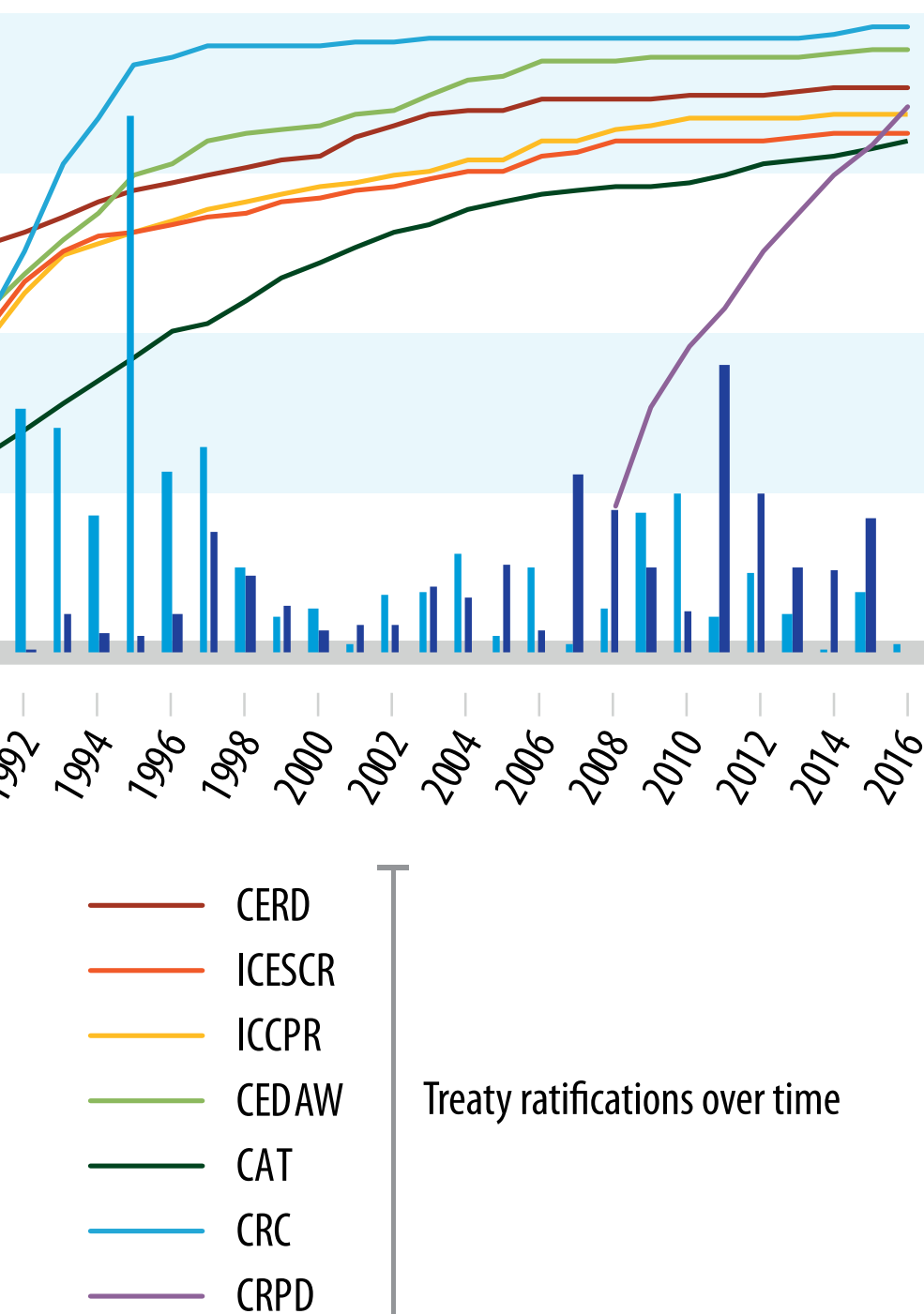
A further 'counting' challenge is that not all reservations are called reservations. States can and do enter a variety of statements under the UN human rights treaties, including reservations, declarations and interpretive statements. For the purposes of this report, and in order to count reservations, the URG overcomes this challenge by following the definition of reservations under article 2 of the Vienna Convention on the Law of Treaties (see also Part I of this report), i.e. we count statements or declarations as reservations so long as they seek to limit the scope of the treaty provisions.

Finally, we count general reservations to the entire treaty as a separate and special type of reservation, and not as a reservation to all provisions under that treaty.

FIGURE 1 THE MARCH OF UNIVERSALITY?



Data as at November 2016. Source: United Nations Treaty Collection homepage (UNTC), and the Office of the High Commissioner for Human Rights Status of Ratification Interactive Dashboard (OHCHR Dashboard). For methodology please see endnote.



## KEY FINDINGS

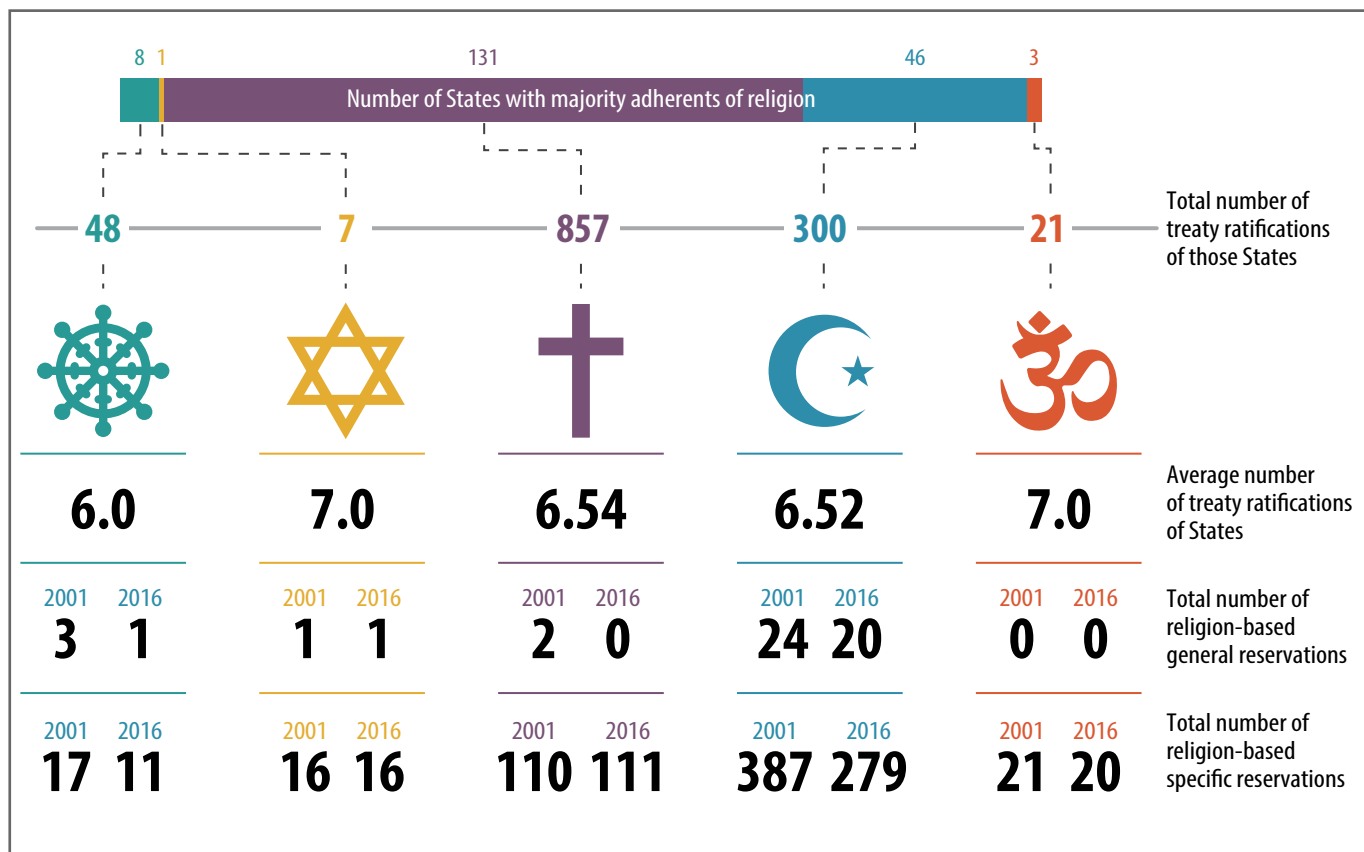
### THE PREVALENCE OF RELIGION-BASED RESERVATIONS TO UN HUMAN RIGHTS TREATIES

Reservations based on religion, belief or religious tradition feature, to varying degrees, in all seven of the core UN human rights treaties.

The UN Migrant Workers Convention (MWC) and the Convention on the Prevention of Enforced Disappearance (CED) - do not have any reservations based on religion, as per the definition employed in this report.

As can be seen in Figures 3 and 4, the CEDAW has attracted the highest overall number of reservations (440), over 60% (274) of which are inspired by religion or belief. The CRC is likewise the focus of both a large total number of reservations (425 - the highest total of any treaty) and, within that picture, a high proportion of religion-based reservations (almost 50% of the total). Both these two treaties enjoy near-universal ratification.

FIGURE 2. RESERVATIONS TO THE UN HUMAN RIGHTS TREATIES BY RELIGION\*



Data as at November 2016. Source: UNTC. For methodology please see endnote. \*Organised religions that are predominant in at least one country. Source of prevalence of religions by country: Pew Research Center.

FIGURE 3. THE RATIO OF NORMATIVE AND RELIGION-BASED RESERVATIONS\*

	Number of State Parties	Total normative reservations (general and specific)	Total normative reservations based on religion (general and specific)	Percentage of normative reservations based on religion
CEDAW	189	440	274	62%
CRC	196	425	202	48%
CAT	160	48	16	33%
CRPD	171	101	25	25%
ICCPR	168	354	37	10%
ICESCR	163	151	21	14%
ICERD	177	94	1	1%

Data as at November 2016. Source: UNTC. For methodology please see endnote. \*Includes standing and withdrawn reservations.

The ICCPR has the third largest total number of reservations (354), but, unlike the CEDAW and CRC, only a small number of those (10%) are motivated by religious considerations. Similarly, the ICESCR has attracted a relatively large number of reservations (151), but only a small percentage of these are religion-based. The CAT has attracted few reservations (48), but where they are present, religious considerations have motivated a third of the total. The CRPD, which only entered into force in May 2008, has attracted 101 reservations in total, of which around a quarter are motivated by religious considerations.

Finally, the ICERD has attracted a relatively small number of normative reservations (94), within which religious motivations appear to play a limited role. The sole reservation motivated by religious concerns to the ICERD is a general reservation entered by Saudi Arabia to the treaty as a whole.<sup>39</sup>

This quantitative analysis reveals two particular patterns. First, perhaps not unexpectedly, there is a close relationship between the issue area of a treaty and the prevalence of reservations based on religion. Treaties that penetrate more squarely into societal issues and/or the private sphere, for example, the CEDAW, CRC and CRPD, have attracted more religion-based reservations. Reservations to the CAT are the possible exception to this pattern. Here, religion-based reservations deal mainly with different religious-cultural views on crime and punishment.

Second, there is a significant correlation between the style of treaties and the prevalence of religion-based reservations. The CEDAW, CRC, CAT and CRPD are often regarded as 'implementing treaties,' as they include more detailed provisions with re-

gard to the general ideals and principles already present in the ICCPR, the ICESCR, and the Universal Declaration of Human Rights. Whilst States have not entered any reservations to the general ideas of equality between men and women in the ICCPR and the ICESCR, for example, more granular pronouncements of the same ideals — i.e. equality in the family sphere — have attracted a significant number of religion-based reservations. Seen from this perspective, it is perhaps no surprise that detailed 'implementing treaties' dealing with cultural-societal issues of gender equality, the role of men and women in the family, and the rights of children, have received the lion's share of religion-inspired reservations.

## GENERAL RELIGION-BASED RESERVATIONS

General reservations have particularly malign consequences for the integrity of a treaty and its domestic application, because they limit or modify all the obligations acquired by the reserving State under the instrument.

Like reservations generally, the CRC and CEDAW are a particular 'target' for general reservations, and a significant proportion of those (86% and 66%, respectively) are inspired or based on religion or belief.

In the case of the CRC, religiously motivated general reservations have (historically) been submitted by 12 States: Afghanistan, Brunei, Djibouti,<sup>40</sup> The Holy See, Iran, Kuwait, the Maldives,

Mauritania, Pakistan, Singapore,<sup>41</sup> Saudi Arabia and Qatar.<sup>42</sup> With two exceptions, these are all members of the Organisation of Islamic Cooperation (OIC), and their reservations have similar effects: to exclude the application of those CRC articles that are incompatible or inconsistent with the Islamic *Shariah*. Djibouti, Mauritania, Singapore and Qatar have subsequently lifted their general reservations to the CRC.

The CEDAW has, since its adoption, received general religion-based reservations from 10 States: Brunei, Libya, Malawi,<sup>43</sup> the Maldives, Mauritania, Oman, Pakistan, Saudi Arabia, Singapore<sup>44</sup> and Tunisia.<sup>45</sup> All are members of the OIC, except for Malawi and Singapore (which withdrew their reservations in 1991 and 2007 respectively). All OIC member State general reservations (except Pakistan) make direct reference to religion. Indeed, these reservations are all based on very similar wording – apparently based, originally, on Saudi Arabia’s general reservation to the CEDAW, which excludes the application of the treaty ‘in case of contradiction between any term of the Convention and the norms of Islamic law.’ Malawi, Pakistan and Singapore have subsequently lifted their general reservations to the CEDAW.

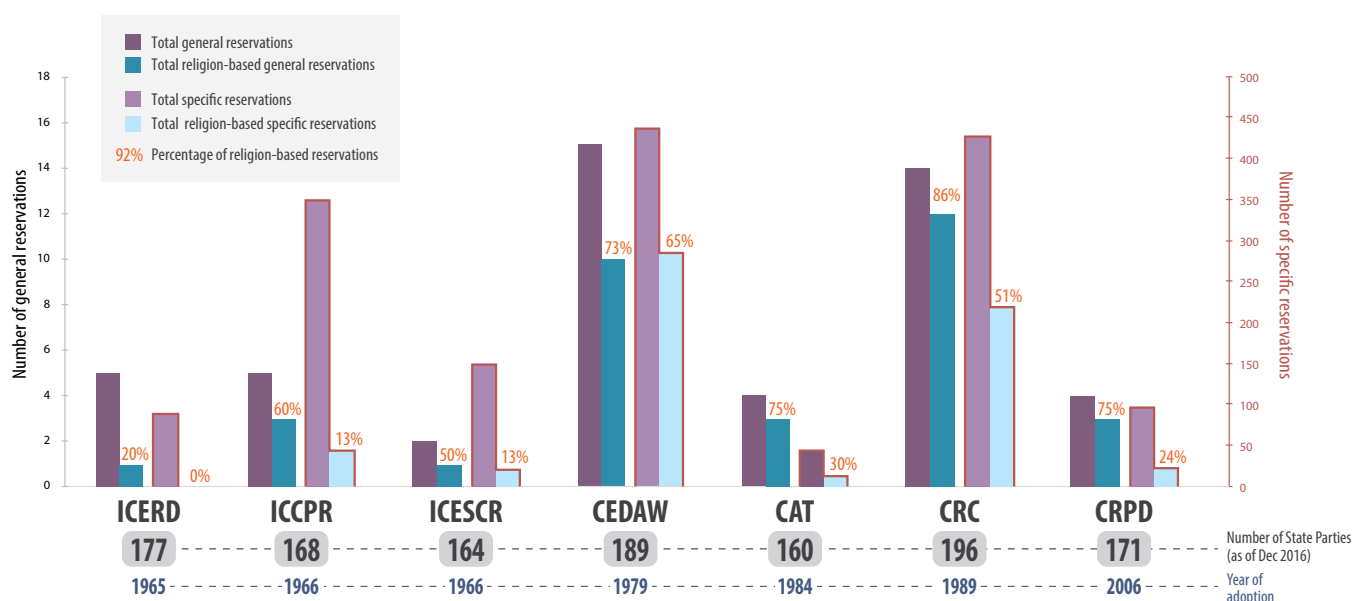
Pakistan’s general reservation to the CEDAW (now withdrawn) is the exception among OIC States, in that it refers to domestic

law rather than ‘Islamic law.’ The reservation reads: ‘the accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.’ Notwithstanding, because Islam / Islamic law is a source of Pakistan’s Constitution, this general reservation is considered to be ‘religion-based’ for the purposes of this Policy Report.

Malawi’s general reservation (later withdrawn) excluded the implementation ‘of the provisions of the Convention as require immediate eradication of such traditional customs and practices’ that are incompatible with the CEDAW.

In the case of the CAT, ICCPR, CRPD and ICERD, the use of general reservations is comparatively limited, though where they do exist or have existed, religion or belief has been one of the main motivations. Regarding the CAT, only Qatar<sup>46</sup> and the Holy See (a permanent observer State of the UN) have ever entered general religious reservations to the treaty – Qatar subsequently withdrew its reservation in 2012. In the case of the ICCPR, religion-based general reservations have been put forward by Egypt, Israel and Yemen. Saudi Arabia is the only country with a general reservation to the ICERD.

FIGURE 4. GENERAL AND SPECIFIC RESERVATIONS AND RELIGION-BASED RESERVATIONS TO THE CORE UN HUMAN RIGHTS TREATIES



Data as at November 2016. Source: UNTC. For methodology please see endnote.

The above data analysis should be read with a number of important caveats. First, while it is true that there are far fewer general reservations - including religion-based general reservations - to the ICCPR than there are to the CRC or the CEDAW, that is partly because not all countries that have ratified and entered general reservations to the latter two conventions are Party to the ICCPR (e.g. Qatar, Saudi Arabia and Oman). Second, even with this first caveat in mind, the choices of States, in terms of submitting general reservations, do not always appear coherent. For example, Saudi Arabia has entered reservations to the CEDAW and CRC, but has chosen not to do so in the context of the CRPD - even though the latter treaty also covers, *inter alia*, the rights of women and children.

## SPECIFIC RELIGION-BASED RESERVATIONS

Turning to those religion-based reservations that focus on particular articles or paragraphs of the relevant treaty (and therefore limit or modify only certain specific obligations, as acquired by the State), URG's mapping exercise shows that, like general

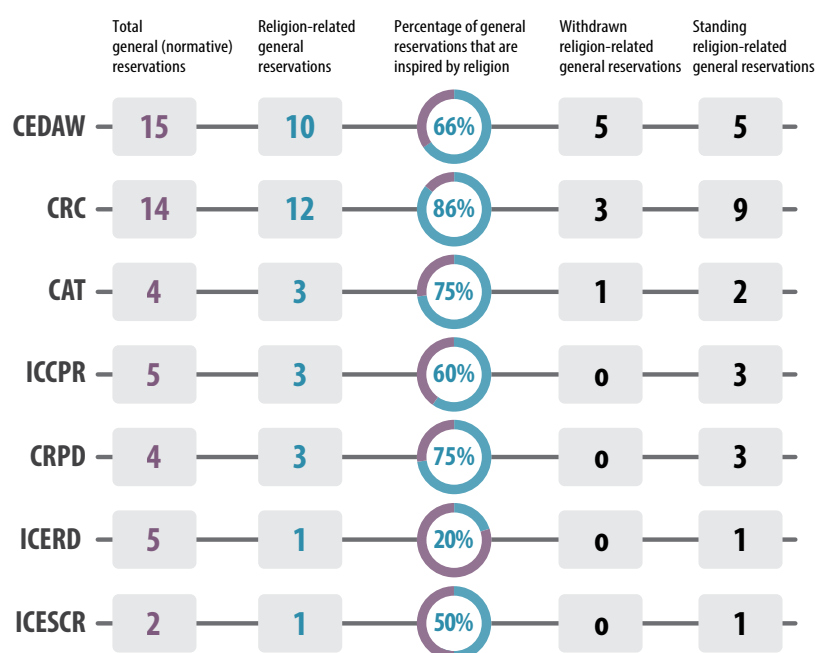
reservations, specific reservations are distributed extremely unevenly both between and within the core conventions. In other words, certain treaties and, within those treaties, certain articles, attract far more religion-based reservations than do others. Indeed, a review of URG's reservations map shows that some articles and provisions of certain treaties are veritable 'lightning rods' for religion-based reservations.

### RELIGION-BASED RESERVATIONS TO THE CEDAW

The CEDAW is the treaty that has, historically, attracted the most religion-based reservations. Since the treaty was adopted in 1979, nearly 260 specific individual reservations have been entered by 28 States Parties (representing 15% of all States Parties), covering around one half of all of the treaty's normative provisions, (though some of these have subsequently been lifted). This is in addition to the ten religion-based general reservations to the CEDAW, as discussed above.

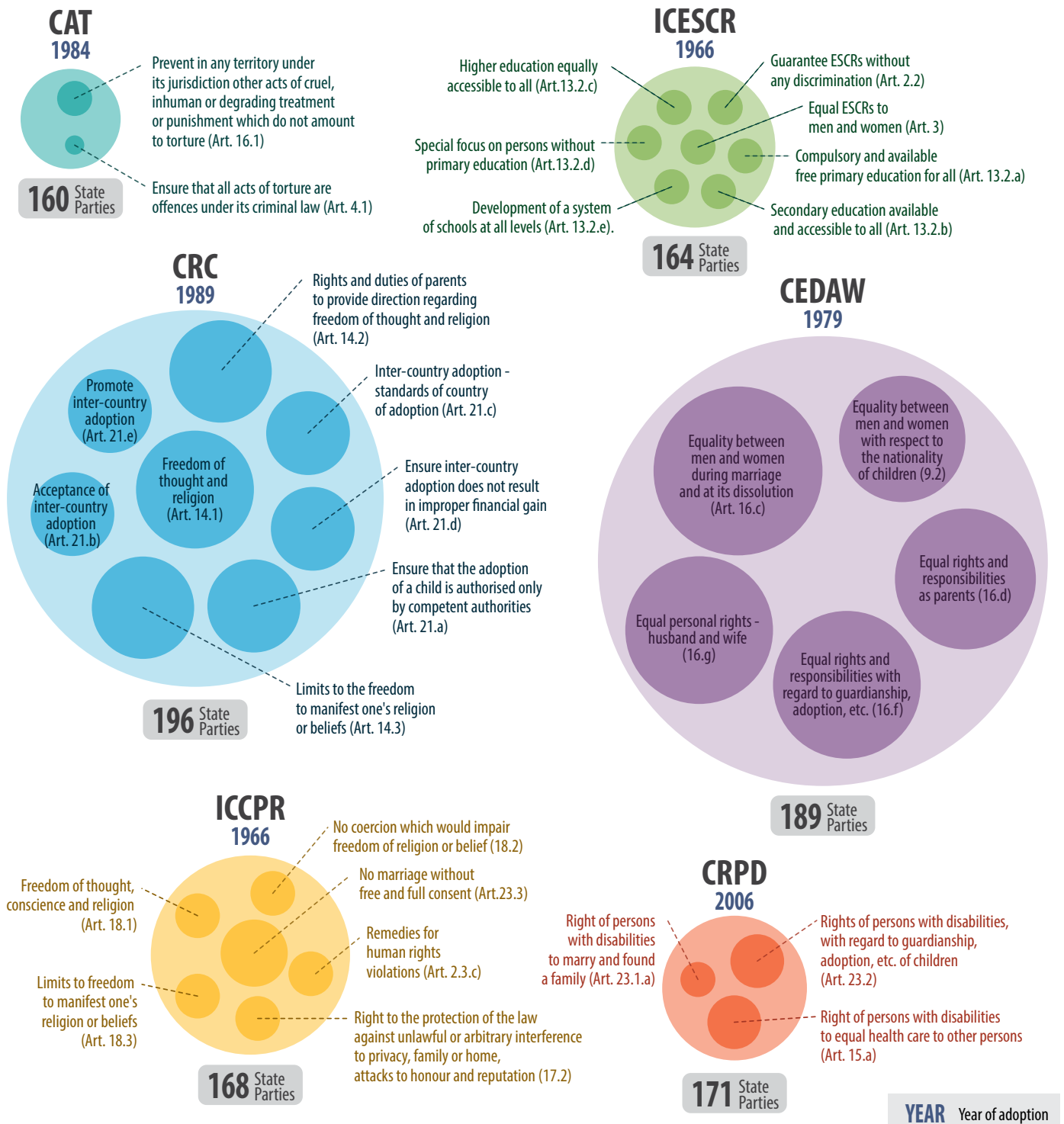
These reservations seek to weaken the States' obligations to ensure equality and non-discrimination between the sexes, in line with the prevailing socio-religious *status quo* in the countries concerned - a *status quo* that favours men over women.

FIGURE 5. DISTRIBUTION OF GENERAL RESERVATIONS ACROSS THE CORE UN HUMAN RIGHTS TREATIES



Data as at November 2016. Source: UNTC. For methodology please see endnote.

FIGURE 6. MOST COMMONLY RESERVED PROVISIONS OF THE CORE UN HUMAN RIGHTS TREATIES



\*The CERD has not received any specific reservations. Data as at November 2016. Source: UNTC. For methodology please see endnote.



## ARTICLE 16, CEDAW - A 'LIGHTENING ROD' FOR RELIGION-BASED RESERVATIONS

*1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

- a. The same right to enter into marriage;*
- b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
- c. The same rights and responsibilities during marriage and at its dissolution;*
- d. The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*
- e. The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*
- f. The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;*
- g. The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; and*
- h. The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*

*2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.*

Most of these reservations serve to protect the privileged position of men in family relations.

The CEDAW Committee (see below) has systematically queried the compatibility of these reservations (especially those applied to articles 2 and 16) with the object and the purpose of the convention.<sup>47</sup> Likewise, other States Parties have repeatedly objected to religion-based reservations under the CEDAW. In total, there have been around 225 formal objections (by 24 States) entered against reservations to the convention, over 80% of which relate to religion-based reservations.<sup>48</sup>

### Equal rights of men and women in the family

The provisions of the CEDAW that aim to regulate the equal rights of men and women in the family (article 16) have historically attracted the most religion-based specific reservations (through some of these have subsequently been withdrawn - see Figure 7). Under article 16, the most reserved sub-provisions have been those that concern equality rights between men and women during marriage and after its dissolution, followed by sub-provisions that grant the same personal rights to husbands and wives (i.e. the right to choose a family name, a profession and an occupation), and equal rights and responsibilities to men and women with regard to guardianship, wardship, trusteeship and the adoption of children (see Figure 6).

A review of reserving States shows that Muslim-majority or Islamic States are most likely to enter reservations under article 16 and its sub-provisions. Notwithstanding, non-OIC States, in-

cluding India, Israel, Malta, Micronesia and Singapore have also entered religion-based reservations to at least one provision under this article - these reservations entered by non-OIC States are still standing.

### Eliminating discrimination against women

The second most reserved article of the CEDAW is article 2, under which 'Parties condemn discrimination against women in all its forms, [and] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.' This article has, since the adoption of the treaty, received 64 religion-based reservations. Amongst these, the most reserved sub-paragraph is paragraph 2 (f), under which States Parties commit to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women.' Religion-based reservations to this article come exclusively from Muslim-majority countries.

Some of these reservations make reference to internal law, but in all cases the source of referenced domestic legislation is religion. An example of this is the reservation entered by Algeria, which reads:

*'The Government of the People's Democratic Republic of Algeria declares that it is prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the Algerian Family Code.'*

Other reservations to article 2 make direct reference to religious norms. Examples of these include: a reservation entered by Bahrain which reads 'the implementation of these articles will be without breaching the provisions of the Islamic *Shariah*;' a reservation entered by Libya which reads 'the Convention shall be implemented with due regard for the peremptory norms of the Islamic *Shariah* relating to determination of the inheritance portions of the estate of a deceased person, whether female or male;' and a reservation entered by the United Arab Emirates which reads '[since] article 2 (f) violates the rules of inheritance established in accordance with the precepts of the *Shariah*, [UAE] makes a reservation thereto and does not consider itself bound by the provisions thereof.'

As these examples suggest, many of the specific reservations to article 2 (f) concern inheritance rights, even though this topic is not explicitly covered by the CEDAW.

Because of the crucial importance of article 2 to the CEDAW treaty and the overall integrity of its operation, specific reservations to this provision act, in practice, as *pseudo* general reservations to the CEDAW, greatly diluting the obligations of reserving States to eliminate discrimination against women.

### Equality before the law

The third most reserved provision of the CEDAW is article 15, concerning women's 'equality with men before the law.' Article 15 has received 15 reservations, two of which have been withdrawn (i.e. the ones entered by Tunisia and Jordan). These reservations are particularly focused on sub-article 15 (4), which gives equal rights to women and men with regard to freedom of movement and the freedom to choose their residence and domicile. Reservations here come mainly from Muslim-majority countries in Africa and the Asia-Pacific region, though Malta, a majority Catholic State, has also entered religion-based reservations to this provision. Importantly, two OIC members - Tunisia and Jordan - have withdrawn all their religion-based reservations to article 15 (4).

### Right of women to pass their nationality to their children

Another heavily reserved provision of the CEDAW (on religious grounds) is the right of women to pass on their nationality to their children. Women's rights activists in Muslim-majority States question the religious justification for these reservations, because (they point out) Islamic law does not touch upon the

citizenship rights of men and women. Such reservations point to the difficulties of separating religious considerations from long-standing cultural or political economy considerations.

## RELIGION-BASED RESERVATIONS TO THE CRC

The CRC is the treaty that has attracted the second highest number of religion-based reservations. Since the Convention's adoption in 1989, 200 specific reservations motivated by religious concerns have been extended by 23 States Parties (representing 11% of all States Parties), covering around one half of the treaty's normative provisions. This is in addition to the 12 religion-based general reservations to the CRC, as discussed above.

These religion-based reservations have in turn received around a hundred formal objections from other (16) States Parties.<sup>49</sup>

### Adoption

Most specific religion-based reservations to the CRC have been entered under article 21, which regulates the adoption of children (this article has received 46 reservations, entered by ten States - Bangladesh, Brunei, Canada, Egypt, Indonesia, Jordan, Kuwait, the Maldives, Oman, and the United Arab Emirates). The significance of adoption from a religious perspective lies in the different norms that underpin the institution in Muslim-majority States. Adoption is prohibited under Islamic law, which instead promotes a form of guardianship called '*kafala*.' Canada is the only non-predominantly Muslim country to have entered a religion-based reservation to this article (to sub-paragraph 21 (a)).<sup>50</sup>

### Freedom of religion

The second-most reserved provision, on religious grounds, of the CRC, is article 14. Article 14 enshrines the right of children to freedom of religion or belief. 36 reservations - some of which have been lifted - by 14 States have been entered to the provisions of article 14. Most of the reserving States are OIC members - the exceptions being the Holy See and Kiribati.

### Definition of a child, punishment, nationality

Religious grounds are also invoked to question: the definition of a 'child' (under article 1 of the convention); acceptable ways of punishing a child (article 2); and the right to health of a child, including in the context of providing information on reproductive

health (article 24). As is the case with the CEDAW, some States Parties to the CRC have also entered reservations to the treaty's provisions dealing with the nationality of children.

Other reservations (by non-OIC States) include: a reservation entered by Argentina to article 24.2 (f) concerning preventive health care which reads 'questions relating to family planning are the exclusive concern of parents in accordance with ethical and moral principles;' and Guatemala's reservation to article 1 (definition of a child) which affirms that 'the State guarantees and protects human life from the time of its conception.' Both reservations relate to the broader topic of sexual and reproductive rights, a matter that is strongly governed by Catholic principles.

## RELIGION-BASED RESERVATIONS TO THE CAT

The CAT has attracted 16 religion-based reservations (representing around 35% of all reservations), extended by three States Parties.

These religion-based reservations have in turn received 69 objections from 28 States.

### Prevention of torture

Article 16, under which each State Party commits 'to undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment, which do not amount to torture as defined in article 1,' has received the highest number of specific religion-based reservations (four reservations, two entered by Pakistan - withdrawn in 2011 - and two by Qatar).

Other standing reservations concern those provisions that regulate the definition of torture or degrading treatment (article 1), and the criminalisation of acts considered as torture (article 4). These reservations tend to make reference to domestic legislation, which is influenced by, or rooted in, broader religious precepts. Examples of these restrictive acts are the reservation entered by Qatar to article 1, which conditions its implementation to its compatibility with the Islamic *Shariah*; and the (now withdrawn) reservation entered by Pakistan, which conditioned the applicability of the provisions of Article 4 to '*the extent that*

*they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws.*'

In general, religion-based reservations under these various articles seek to secure a 'opt out' from States' obligations under the treaty for long-established and/or traditional punishments - punishments that in many cases are derived from or associated with religious belief or religious law.

The vague nature of many of these reservations, and the severity of the nature of human rights violations associated with torture, may explain why so many of the reservations have been the subject of objections by other States Parties. The curious exception to this rule is a declaration by the Holy See, which has not received any objections despite the fact that the reservation limits the application of the treaty 'insofar as it is compatible, in practice, with the peculiar nature of that State.'

## RELIGION-BASED RESERVATIONS TO THE CRPD

Despite only being adopted in 2006, the CRPD has rapidly attracted a large number of ratifications - and reservations. However, a relatively small proportion of those reservations (around a quarter - compared with over three quarters in the case of, for example, the CEDAW) are based on religion or belief. None of the religion-based reservations to the CRPD have been the subject to objections from other States Parties.

What is particularly interesting in the case of the CRPD, is that those Muslim-majority States that entered religion-based reservations to older treaties, like the CRC and the CEDAW (e.g. Algeria, Bangladesh and Saudi Arabia), ratified the CRPD with no general reservations (the exceptions to this rule are Qatar and Iran) and/or no specific reservations (the exception being Egypt). It is noteworthy that prior to its ratification of the CRPD, Saudi Arabia had entered general reservations to all core human rights conventions at the time of ratification. Yet, it decided not to do so for the CRPD.

This does not mean, of course, that religion-based reservations are entirely absent from the CRPD. Such reservations, where they exist, are clustered around two treaty articles: article 23 on respect for home and the family (12 reservations); and article 25 on health (nine reservations).

These reservations, put forward by six countries - Catholic-majority Lithuania, Malta, Monaco and Poland, together with Israel and Kuwait - mostly relate to those treaty provisions dealing the sexual and reproductive rights of persons with disabilities (article 25 (a)), and 'the rights and responsibilities of persons with

disabilities, with regard to guardianship, ward-ship, trusteeship, adoption of children or similar institutions' (article 23 (3)).

It is important to note that the reservations to article 25 (a), which refers to right of persons with disabilities to have 'the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health,' do not make direct reference to religion. However, they are clearly linked with socio-religious concerns in Catholic-majority States around issues of abortion, the conception of life, and the rights of the unborn child.

## RELIGION-BASED RESERVATIONS TO THE ICCPR AND THE ICESCR

The ICCPR and the ICESCR have been the subject of a relatively small number of religion-based reservations, though such reservations make up a high proportion of general reservations made to the two Covenants (60% and 50%). General reservations to the Covenants have been made by Egypt, Iran and Saudi Arabia (see pages 20 - 21). 26 other States Parties (20 from the Western Group, five from Eastern Europe, and two from Latin America) have submitted 78 objections to reservations to the ICCPR, while only eleven objections from eight States (all from the Western Group) have submitted objections to reservations to the ICESCR. This may be because important reserving States are also from the Western Group / Europe.

Regarding specific reservations to the ICCPR, the provision that has received the highest number of religion-based reservations is article 23 dealing with issues of family and marriage (14 reservations from five States). In particular, the sub-paragraph of article 23 on 'appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution' has attracted five reservations from five States (i.e. Algeria, Bahrain, Israel, Kuwait, and Mauritania). Other reserved articles are those concerning freedom of thought and religion (article 18) and the equal rights of men and women (article 3). These latter two articles have received three reservations each: from Bahrain, Kuwait and Pakistan (now withdrawn); and from Bahrain, the Maldives and Mauritania, respectively).

Turning to the ICESCR, the most reserved provision on religious grounds is article 2, under which a State Party commits to undertake 'steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights

recognized in' the ICESCR. Religion-based reservations entered under this article are mainly focused on the second sub-paragraph, which states that each individual must have equal rights to economic, social and cultural rights 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' The States that have entered the four reservations under article 2 are Bangladesh and Kuwait.

Closely linked with these reservations to the principle of non-discrimination are reservations to article 3 (on the equal rights of men and women).

Finally, 14 religion-based reservations have been entered under ICESCR articles 10 (family, childbirth and the protection of children) and 13 (right to education). These specific reservations have been entered by three countries - Ireland, Kenya and Malta. Regarding the latter provision, unlike article 14 of the CRC, article 13 of the ICESCR requires States 'to ensure the religious and moral education of their children in conformity with their own convictions.' Malta, in its reservation, argues that it not possible to respect this right for all religious groups in the country due to the predominantly Roman Catholic nature of the population.<sup>51</sup> The provision has not attracted any reservations from Muslim-majority States.

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## WITHDRAWAL OF RELIGION-BASED RESERVATIONS

In a trend with important positive implications for the universality of human rights and the determination of States to strengthen their commitments and obligations under international human rights law, between 1991 and 2015, 22 States (all of them OIC member States, except for Mauritius and Singapore) have withdrawn 127 religion-based reservations to the core human rights treaties. Nine of the lifted reservations were general reservations, the rest were specific to certain treaty provisions.

Regarding lifted general reservations; nine States (all OIC States, except for Singapore) have lifted such reservations - all of them (with the exception of Qatar's withdrawal of its reservation to the CAT) from either the CRC (3 cases) or the CEDAW (5 cases). See Figures 5 and 8.

FIGURE 7. WITHDRAWN SPECIFIC RELIGION-BASED RESERVATIONS BY COUNTRY

Country	Year of withdrawal (specific reservations)	Treaty
Algeria	2009	CEDAW
Bangladesh	1997	CEDAW
Brunei Darussalam	2015	CRC
Egypt	2003	CRC
	2008	CEDAW
Indonesia	2005	CRC
Iraq	2014	CEDAW
Jordan	2009	CEDAW
Kuwait	2005	CEDAW
Malaysia	1998	CEDAW
	2003	CRC
	2010	CEDAW
The Maldives	2010	CEDAW
Mauritius	1998	CEDAW
Morocco	2006	CRC
	2011	CEDAW
Oman	2014	CRC
Pakistan	2011	CAT
	2011	ICCPR
Singapore	2011	CEDAW
Syrian Arab Republic	2012	CRC
Tunisia	2002	CRC
	2008	CRC
	2014	CEDAW

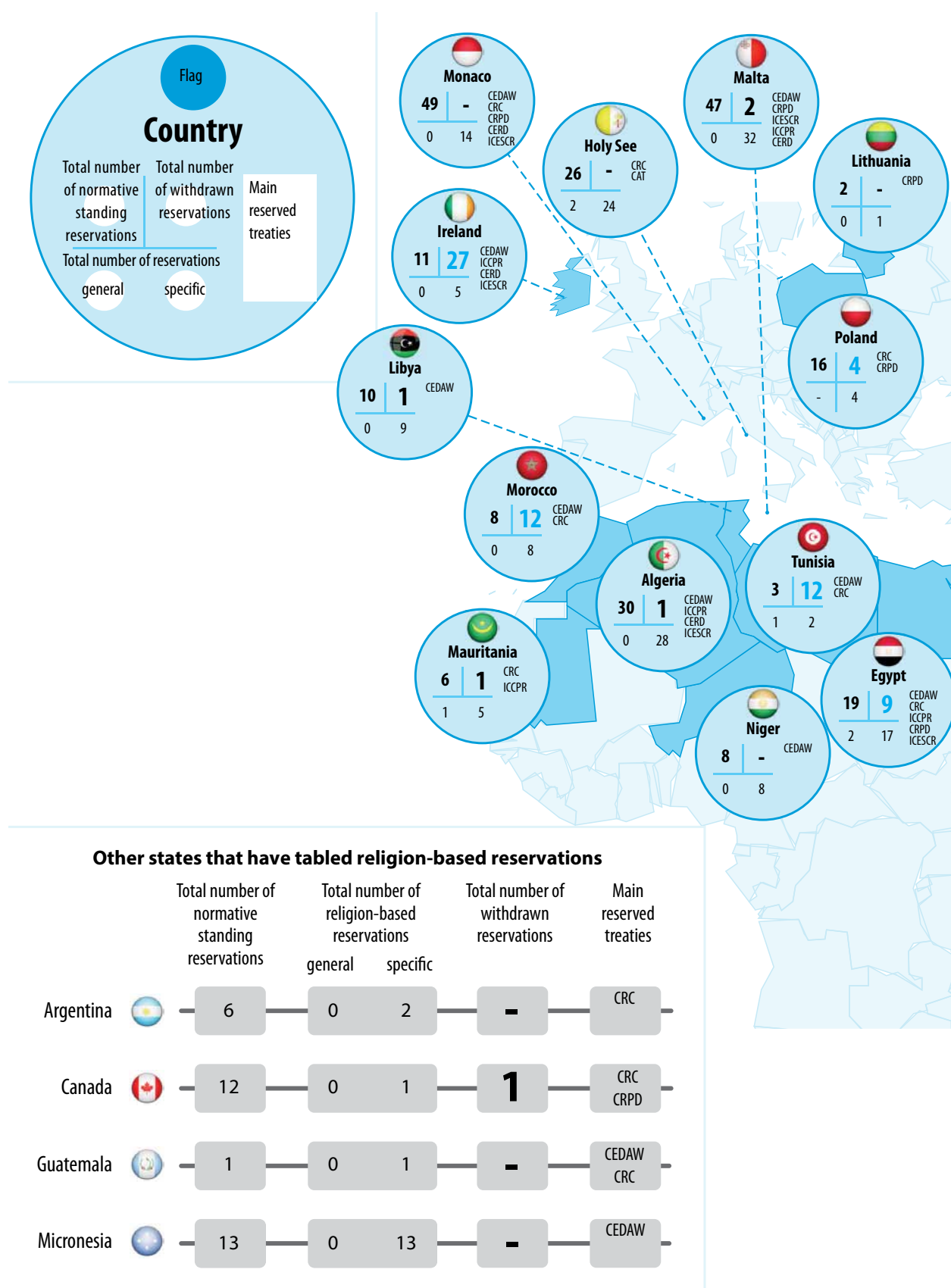
Data as at November 2016. Source: UNTC. For methodology please see endnote.

Regarding specific reservations (see Figure 7), 17 States Parties have lifted 118 religion-based reservations - nearly all of them reservations to the CEDAW or CRC, (the exceptions being Pakistan's withdrawal of nine reservations to the CAT and 4 to the ICCPR, in 2011). All but two (Singapore and Mauritius) of the 17 lifting States are members of the OIC. The CRC has been the treaty with the largest number of lifted specific religion-based reservations (over 60), followed by the CEDAW (over 40 withdrawals). Only four specific reservations to the ICCPR and nine specific reservations to the CAT have been lifted. No specific religion-based reservation to the CRPD or the ICESCR has, to-date, been withdrawn.

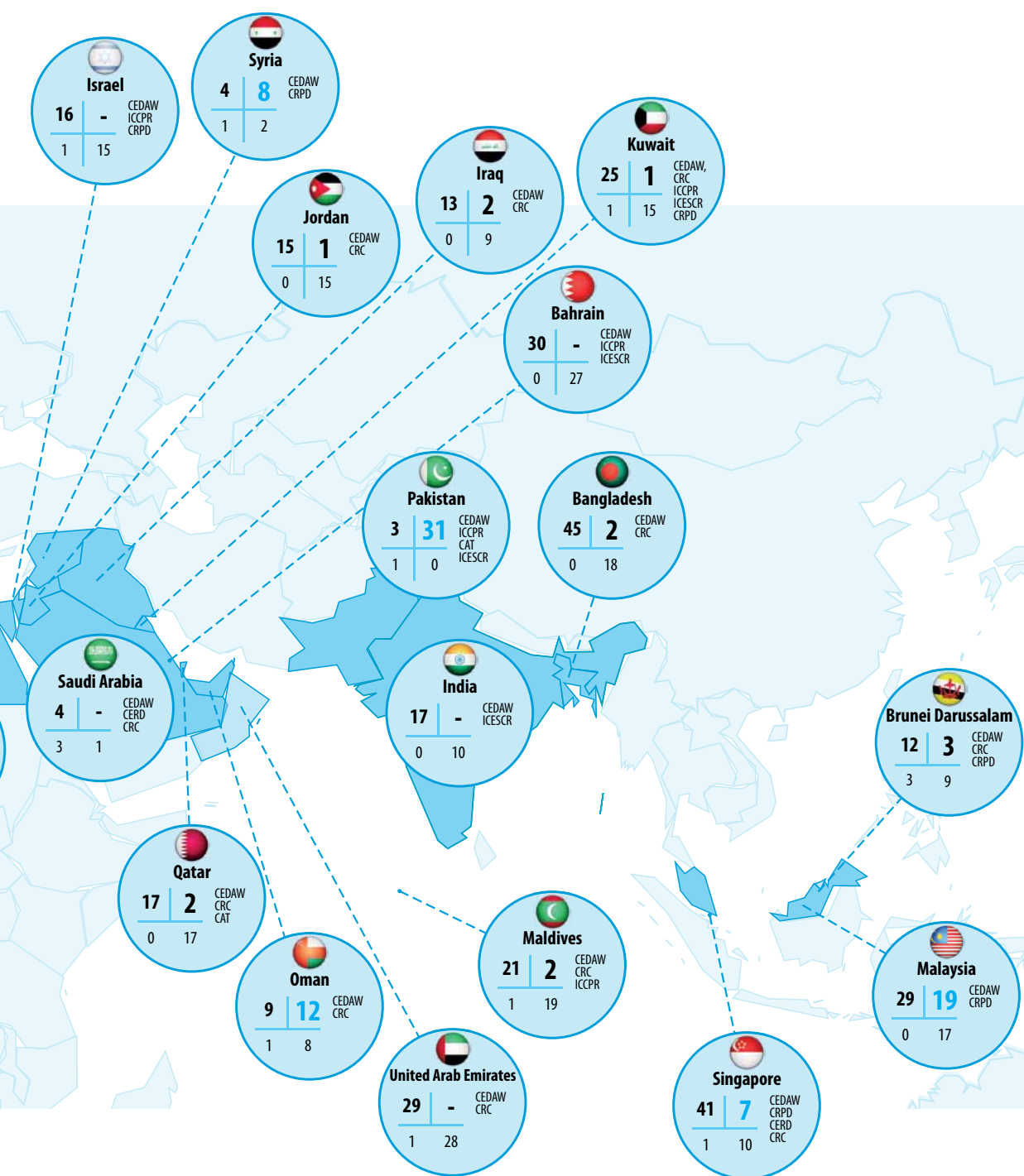
These trends are important because they show that States recognise the negative consequences of reservations for the domestic enjoyment of human rights and, therefore, the importance of lifting them in line with UN Treaty Body recommendations<sup>52</sup> and the ILC Guiding Principles.<sup>53</sup> It is also important

because it suggests that where States have reflected on the relationship between universal human rights norms and domestic religious doctrine and belief, for example, through inclusive domestic consultations, they have found there to be no overarching incompatibility between the two. On this last point, it is notable that nearly all case studies relating to the lifting of religion-based reservations involve Muslim-majority States - a positive trend that argues against the notion - propagated by cultural relativists, religious conservatives and polemicists - that there is an inherent incompatibility between Islamic doctrine and law, and universal human rights. On the contrary, the evidence is clear: where States engage in inclusive domestic debates about the compatibility of national practices and laws (including where those domestic norms are influenced by religion or tradition) with international human rights obligations and commitments, they tend to conclude that there is no inherent contradiction and therefore that relevant reservations to the international human rights treaties can be withdrawn.

FIGURE 8. RELIGION-BASED RESERVATIONS BY COUNTRY\*



Data as at November 2016. Source: UNCTC. For methodology please see endnote. \*Only includes countries with standing religion-based reservations.





## PART III.

# THE POLITICAL REALITY OF RESERVATIONS AND THEIR WITHDRAWAL

Existing literature on reservations to the core human rights conventions tends to see them as an essentially legal concern – as a matter of international treaty law and an area of contestation between States Parties. Taking their cue from this orientation, members of UN Treaty Bodies and UN member States participating in the Universal Periodic Review (UPR) have tended to adopt a highly legalistic or simplistic approach to reservations, emphasising their negative consequences for the integrity of the human rights conventions and the obligations of States.

In reality, reservations are inherently and acutely political. They represent the outward, external manifestation of deeply sensitive political questions related to the relationship between universal human rights norms and national/local culture, religious beliefs and traditions. They also reflect the final settlement, or outward expression, of complex domestic debates between relevant stakeholders (different government ministries, lawyers, religious leaders and NGOs) about how best – to borrow language from operative paragraph 5 of the Vienna Declaration and Programme of Action – to ‘promote and protect all [universal, indivisible, interdependent and inter-related] human rights and fundamental freedoms,’ while bearing in mind ‘the significant of national and regional particularities and various historical, cultural and religious backgrounds.’ After all, contrary to predominant contemporary political and legal narratives, States are not unitary entities (usually seen as interchangeable with the government or the Executive), but rather complex ecosystems made up of different, and often competing, interests and world-views.

Any analysis of treaty reservations and their implications for questions of universality must start from such a nuanced understanding of the nature of States and the intensely political character of national decision-making *vis-à-vis* the acceptance (or lack thereof) of obligations under the international human rights treaties, if it is to be useful and productive.

But what is meant by ‘useful and productive’? What is the ultimate goal of any analysis, and indeed of this Policy Report, and the project of which it is part? These questions were repeatedly raised during the policy dialogues in Geneva, Istanbul and Tübingen, held in preparation for this report. Is the goal to embarrass or shame States by drawing attention to ‘immoral’ reservations and their negative implications for the enjoyment of human rights, and thus to somehow ‘force’ States to withdraw them? The answer to such a question is ‘no.’ As the title of this report clearly suggests, the URG is a committed advocate of the universality of human rights, but it does not subscribe to the view that certain States are inherently opposed to universality, or are inherent supporters of cultural relativism, including on grounds of religion. Rather, it takes the view that universality will not happen overnight – and that the speed with which States can travel towards that destination is dependent on domestic political (democratic) processes premised on moving all parts of society towards a common understanding of universal rights, and a common conviction that there is nothing inherently contradictory between those rights and their own traditions, cultures or religious beliefs.



Thus, the focus of any useful analysis should be on the domestic experiences of States: what were the main domestic political dynamics that led a State to ratify a treaty, but at the same time, submit reservations to one or more articles of that treaty?; and - crucially - in cases where a State was able, subsequently, to withdraw that reservation, what were the domestic political dynamics which made that possible?

Based on this analysis, which the first half of Part III of this Policy Report aims to help provide; it is then possible to ask a second key question: how can the international community help promote or replicate those good domestic practices that allowed a State to review the necessity of its reservations and come to the conclusions that they were no longer required?

## SELECTED NATIONAL CASE STUDIES

### THE STRENGTHENING OF MOROCCO'S OBLIGATIONS UNDER THE CEDAW

In 1958, Morocco adopted *Moudawana*, the national Family Code. The *Moudawana*, including those provisions touching upon women's rights, equality and non-discrimination, reflected the political and religious views of the more conservative parts of Moroccan society. These groups ('the *Ulemas*') viewed the Islamic *Shariah* as the main source of, and inspiration for, domestic legislation, including in the area of family law. Indeed,

religious leaders and conservative Islamic scholars and jurists viewed the *Moudawana* as, in essence, a religious text.

During the 1990s, domestic civil society pressure began to mount in support of reform of the *Moudawana*. This movement, which was led, especially, by women's rights advocacy groups like Women's Action Union, did not seek to challenge the Islamic character of Morocco,<sup>54</sup> but rather sought to inform and educate (e.g. through media campaigns and educational programmes)<sup>55</sup> key stakeholder groups, promoting the idea that there is no inherent conflict between Islamic beliefs and doctrine on the one hand, and universal human rights, including women's rights, on the other. This constructive approach enabled the movement to win friends and supporters within the Moroccan Government - a point recognised in a number of Morocco's reports to the United Nations.<sup>56</sup>

However, many supporters of the *Moudawana* family code remained unmoved, and continued to oppose any reforms that would be, as they saw it, contrary to the Islamic values that had historically guided the Moroccan people.<sup>57</sup> These important domestic stakeholders also opposed efforts to bind Morocco more closely with international human rights norms, for example by ratifying relevant human rights conventions.

Caught between these competing pressures, tentative reform efforts, such as one launched in the 1990s by the then King of Morocco, King Hassan II, met with only limited success (a first amendment to *Moudawana* family code was adopted in 1993, but did not include key changes requested by women's rights groups).



Moroccan peaceful protest against discrimination

In June 1993, Morocco decided to ratify the CEDAW. Recognising the strong and divergent views on issues of women's rights and family law across society, the Government balanced the decision to become Party to the CEDAW with a decision, designed to assuage the more conservative parts of society, to enter 18 religion-based reservations to key treaty provisions. In a further sign of domestic political tension over this matter (and despite repeated calls from the CEDAW Committee for them to do so)<sup>58</sup> the Government did not publish the Convention in its 'Official Bulletin' - a prerequisite for any international treaty to become part of Moroccan law - until 2001.<sup>59</sup>

In 2000, on a historic day for human rights and democratic debate in Morocco, these two groups - the reformist movement and the *Ulemas* - held two 'competing' mass protests: one in Rabat for those supportive of legislative change and stronger women's rights; and one in Casablanca for the more conservative parts of the population who argued in favour the *status quo* and for respect for Islamic values, as enshrined in the *Moudawana*, and who labelled the proposed reforms as an attempt to impose 'Western values' on Morocco.

In 2001, the Government of Morocco established a Royal Commission of religious authorities and law experts to study the issues and to propose amendments to the family code, taking into account the different views of all domestic stakeholders, as well as relevant Islamic principles. After 30 months of difficult and sometimes contentious deliberations, the Commission presented its recommendations to the new King, Mohammed VI, in 2003, who used them as the basis for legislation that he submitted to Parliament in October of that year. 'The Parliament debated the reforms extensively, making some 110 amendments before unanimously approving the final text.'<sup>60</sup>

The new Moroccan Family Code was adopted in February 2004. The main changes in the new Code, as compared to its predecessor, reflected key recommendations of the CEDAW Committee. In particular, the Code included provisions recognising core principles, such as equality in different aspects of marriage and divorce, in matters relating to custody of children, and in matters of inheritance.<sup>61</sup> The legislation also established the necessary institutional machinery - such as courts and special training institutes for judges and lawyers - to promote the full realisation of these new rights.<sup>62</sup> Three years later, in 2007, Morocco further amended the law to allow women to transmit their nationality to their children.

As a consequence of this comprehensive and inclusive domestic process of consultation, debate and reform, when Morocco presented its first periodic report under the Human Rights Council's UPR mechanism in 2008, it was able to announce its intention to withdraw some of its reservations to the CEDAW.

A few months later, in autumn 2008, the Supreme Council of Muslim Scholars in Morocco, confirmed that the decision to withdraw these reservations did not violate the Islamic *Shariah*. Nevertheless, the head of the Justice and Development Party's group in Parliament expressed their opposition to the withdrawal, arguing that Morocco 'cannot lift all reservations to the point of achieving total equality, because this point is governed by *Sharia*.'<sup>63</sup>

Given these on-going divisions, formal notification of the lifting of the CEDAW reservations was delayed until April 2011, finally occurring in the context of the reform of Morocco's Constitution (a process initiated by King Muhammad VI in response to protests during the so-called 'Arab Spring').<sup>64</sup>

The constitutional changes, which included over 40 new articles devoted to strengthening human rights - including women's rights, were approved on 1 July 2011 through referendum.<sup>65</sup> In light of the referendum result and the clear popular support for reform, Morocco decided to formally lift nearly all of its reservations to the CEDAW (the exceptions being some reservations to articles 2 and 15 [4]).

## **TUNISIA'S WITHDRAWAL OF ITS RESERVATIONS TO THE CEDAW**

In 1956, soon after the Tunisia's independence, a new Constitution was adopted. The Constitution established Tunisia as an Islamic State (article 1), but also recognised freedom of conscience (article 5). Building on the Constitution, the country also adopted a new Personal Status Code. This was the first legal instrument adopted in an Islamic State that recognised the equal rights of men and women in most, but not all, spheres of personal and family life. For example, the Code recognised equality with regards to minimum marriageable age, consent to be married, and the rights and responsibilities of spouses. However, other provisions in the Code, such as those related to inheritance and property, continued to follow traditional values and *Shariah* law.





Third day of demonstrations in front of the national constituent assembly in Tunis.

In 2008, Tunisia ratified the CEDAW but, recognising the concerns from some parts of society, especially religious conservatives who positioned themselves as 'defenders of traditional Islamic values,' entered eight reservations. These reservations concerned treaty requirements to provide equality to women in family matters (including women's ability to pass on their nationality to their children, rights and responsibilities in marriage and divorce, matters relating to children and guardianship, personal rights for husbands and wives with regard to family name and occupation, and equal rights to property). With these reservations, Tunisia sought to balance a desire to demonstrate the State's commitment to women's rights and its determination to promote those rights, with the shorter-term political imperative of assuaging religious concerns and sensitivities.

However, women's rights groups responded by immediately forming a coalition to demand the withdrawal of the reservations. Over time, this civil society coalition secured numerous revisions and amendments to the Personal Status Code - resulting in incremental advances for women's rights in areas such as the determination of nationality (areas that had previously been considered the exclusive domain of men).

In October 2011, following the revolution in Tunisia (the start of the Arab Spring), the Transitional Government adopted Decree-Law 103 lifting the reservations to articles 9, 15, 16 and 29 of

the CEDAW. The Decree-Law was published in the Official Journal of the Tunisian Republic. However, following elections held later that same month, the new Tunisian Government did not send the withdrawal notification to the UN Secretary-General, meaning the lifting of the reservations did not have legal effect. In January 2014, Tunisia adopted its new Constitution. After a determined campaign by civil society, especially women's rights and other human rights NGOs, the new primary law included strong equality, non-discrimination and women's rights provisions.

The adoption of the new Constitution meant that, finally, in April 2014, Tunisia was able to officially notify the UN of its decision to withdraw all specific reservations to the CEDAW. Notwithstanding, Tunisia maintained a general declaration stating that the country 'shall not take any organisational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of Chapter I of the Tunisian Constitution.'

#### **PAKISTAN'S RESERVATIONS TO THE CAT AND THE ICCPR**

Pakistan acceded to the CAT and the ICCPR in 2010. At the time of accession, it entered nine religion-based reservations to the CAT and fourteen to the ICCPR. These reservations sought to restrict Pakistan's obligations under the treaties<sup>66</sup> to be ap-

plicable only insofar as they are compatible with the country's Constitution and with *Shariah* law.

At the time of accession, Pakistan's international partners broadly welcomed the country's decision to become Party to the two core treaties, but a total of 26 States Parties formally objected to the reservations. These States, together with Pakistani and international NGOs, expressed deep concern over the broad nature of the reservations and their significant negative implications for human rights in Pakistan.



Former President of Pakistan Mr. Syed Yousaf Raza Gillani

Notwithstanding this pressure, the reservations remained in place until 2011, when Pakistan applied to receive beneficial trade access to the EU market under the Generalised System of Preferences Plus scheme (GSP Plus).<sup>67</sup> In order to benefit from GSP Plus, countries must comply with various good governance, environmental, human rights, and labour standards. This includes a requirement to ratify the core human rights treaties (as well as ILO conventions and multilateral environmental agreements). However, upon reviewing Pakistan's application, EU member States decided that the country's vague reservations to the CAT and the ICCPR meant that it did not accept to be held accountable against the obligations contained in those treaties, and thus the country did not meet the requirements set by GSP Plus. Pakistan was therefore ineligible to benefit from the beneficial trading arrangements because its reservations, in effect, 'nullified the impact of ratification of these two International Conventions.'<sup>68</sup>

In response, later that same year (September 2011), the-then Prime Minister of Pakistan, Syed Yousaf Raza Gillani, convened an inter-ministerial meeting to consider the EU's decision and the wider question of Pakistan's obligations under the core human rights treaties. The outcome of the meeting was a decision,

by the Government, to officially notify the UN of the withdrawal of all normative reservations to the ICCPR and the CAT (with the exception of a single specific reservation to article 8 of the CAT - dealing with torture as an extraditable offence).

The case of Pakistan is interesting in that it is an example of a 'top-down' or 'externally-imposed' withdrawal of reservations, rather than one that has its genesis in domestic political dynamics and debate. That is not to say the EU was wrong to make preferential trade or development relationships dependent on the observance of international human rights norms - indeed, such an approach can be highly effective. It is rather to show that where such changes are presented by a government to key domestic stakeholders as a *fait accompli*, without their knowledge, involvement or agreement - especially where the population of the country may have concerns about the compatibility of those changes *vis-à-vis* prevailing cultural-religious norms - then the apparent strengthening of the State Party's adherence to international law may remain largely illusory. In Pakistan's case, since the withdrawal of the reservations to the ICCPR and the CAT, very few steps have been taken to reform domestic laws or practice in line with the State's strengthened international obligations.<sup>69</sup>

## INDONESIA AND THE CRC

Indonesia does not officially recognise a State religion,<sup>70</sup> and article 29 of the country's Constitution recognises and guarantees freedom of religion or belief to all individuals, without discrimination. However, the Constitution also promulgates '*Pancasila*,' the official philosophical foundation of the Indonesia State, which includes, as its first principle, belief in the absoluteness of God. Taken together with the fact that around 90% of the Indonesia population is Muslim,<sup>71</sup> this has led some (though others fiercely disagree<sup>72</sup>) to claim that the State and the Constitution have a clear Islamic character.<sup>73</sup>

This is important, in the context of Indonesian reservations to the human rights treaties, insofar as those reservations reference the Constitution, because, it is argued, those reservations are an indirect way of invoking the '*Pancasila*' doctrine and, by extension, Islamic principles.<sup>74</sup>

Indonesia ratified the CRC in September 1990. Disagreements and tension over the degree to which Indonesia and its Constitution are possessed of this Islamic character, and - by extension - the degree to which the country should respect Islamic

principles, help to explain why, when ratifying the treaty, the Government bypassed parliament and approved the decision by presidential decree. Some held that the rights contained in the CRC are universal, and should be enjoyed by all children in Indonesia, without discrimination and without exception; while others argued that the convention imposed 'alien' or 'Western' values and norms in areas of Indonesian life, such a family and children, traditionally governed by religious or traditional norms.

Against this background, at the time of ratification Indonesia presented a declaration (in effect a general reservation), which read as follows:

*'...The ratification of the Convention on the Rights of the Child by the Republic of Indonesia does not imply the acceptance of obligations going beyond the Constitutional limits nor the acceptance of any obligation to introduce any right beyond those pre-*

*scribed under the Constitution. With reference to the provisions of articles 1, 14, 16, 17, 21, 22 and 29 of this Convention, the Government of the Republic of Indonesia declares that it will apply these articles in conformity with its Constitution...'*

With ratification of the CRC came greater political and public awareness of child rights issues. Following studies conducted by universities and local NGOs about children requiring special protection (i.e. child labour, or children in prostitution or homelessness), a public discussion on the rights of the child took place at the national level. These dialogues in-turn led to the creation of an informal group of CRC supporters inside the government. As a consequence of these developments, during its first periodic review before the Committee on the Rights of the Child in 1993, Indonesia announced its intention to review - and perhaps withdraw - the declaration with regard to articles 1, 14, 16 and 29 of the convention.<sup>75</sup> While welcoming the announcement, the Committee nonetheless urged Indonesia to clarify the situation



Children in Jakarta asking for help



with regard to the remaining articles [articles 17, 21 and 22], and to consider withdrawing the declaration in its entirety.

Notwithstanding the debate over the necessity and possible negative impacts of the declaration, the case of Indonesia also demonstrates the potential political value of reservations. The act of tabling a declaration/reservation provided the Government with the political leeway needed to be able to ratify the CRC, and to bind itself to the obligations contained therein (as modified by the declaration). Once it became a State Party, Indonesia was able to begin the process of implementing the treaty - starting with a review of the current situation of the rights of children in the country, and how this situation compared with the rights set down in the Convention. According to the Indonesian Government: 'The first decade after ratification was dedicated to looking into how the CRC could best fit in the legal, political and societal systems, values, norms and practices in a country known for its vast diversities.'<sup>76</sup> What is more, by committing to universal norms and the UN's human rights treaty system, Indonesia opened the door to greater engagement on the part of international development organisations and agencies, such as UNICEF, to help the country fulfil its new obligations.<sup>77</sup> As part of this international support, a national action plan on the rights of the child was developed.

In the late years of the 20<sup>th</sup> and the early years of the 21<sup>st</sup> Centuries, Indonesia experienced a period of political upheaval, as the old regime collapsed and was gradually replaced by a more democratic form of government. This transition provided new opportunities to strengthen the promotion and protection of human rights in the country, including child rights. For example, around this time, the Government created new independent institutions and public offices in the field of human rights, amended the Constitution to include human rights articles (including child rights articles), and, in 1999, enacted a first piece of national legislation specifically focused on promoting and protecting human rights.

The Committee on the Rights of the Child welcomed these reforms, but continued to urge Indonesia to undertake the necessary domestic steps to enable it to formally withdraw its declaration.<sup>78</sup> Later, in 2003, the parliament enacted a dedicated Child Protection Law [23/2002], further enshrining its CRC obligations in national legislation, and passed Presidential Decree 77/2003 creating a national monitoring mechanism.<sup>79</sup>

Following the adoption of the new Law and Decree, the Government of Indonesia announced that the declaration was no longer needed in its present form. Therefore, in 2005,<sup>80</sup> the State submitted a formal notice to the UN Secretary-General stating its decision to partially lift the declaration - withdrawing reference to specific articles of the CRC but maintaining a general reservation making clear that the State only recognises the obligations contained in the Convention insofar as they are compatible with the Constitution. Notwithstanding, this general reservation continues to be criticised by child rights NGOs in Indonesia and abroad.<sup>81</sup>

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## UN HUMAN RIGHTS MECHANISMS: REACTIONS TO RELIGION-BASED RESERVATIONS

It is clear from the above that a decision to withdraw a reservation, including religion-based reservations, must - like the decision to enter them in the first place - be driven by domestic political dynamics, debate and reform. The decision cannot and should not be imposed from above.

That is not to say that the international community cannot play a role. It can. But that role should be to encourage and press the relevant State to begin or intensify a process of domestic political discourse, debate, reflection and reform - involving all relevant domestic stakeholders and the general public - in order to create the conditions for a possible withdrawal; rather than to simply demand an immediate withdrawal. Indeed, any attempt to force or pressurise a country to lift a reservation, especially if that reservation touches upon sensitive matters of religion and tradition, and has the support of significant parts of the population, is likely to be counterproductive.

Within this picture, two UN human rights mechanisms in particular - the Treaty Bodies and the UPR - can play an important role.

This section of the report therefore reflects on the efforts of these two mechanisms to deal with the question of reservations, especially religion-based reservations, to the core human rights treaties.

## TREATY BODIES

There are two main ways in which the UN Treaty Bodies have sought to deal with the issue of reservations: through General Comments or General Recommendations; and through concluding observations (i.e. specific recommendations or observations presented to the States Parties following the consideration of their periodic reports).

### General Comments or General Recommendations

A number of Treaty Bodies have issued General Comments or General Recommendations on the topic of reservations, including: the Committee on the Elimination of Discrimination Against Women (CEDAW Committee),<sup>82</sup> the Committee on the Rights of the Child (CRC Committee)<sup>83</sup>, the Human Rights Committee (which monitors the implementation of the ICCPR), and the Committee Against Torture (CAT Committee).<sup>84</sup>

For example, the CEDAW Committee has reflected on the issue of reservations many occasions. In 1987, with General Recommendation 4, it expressed concern at the high number of impermissible reservations tabled by States Parties, and encouraged reserving States to withdraw them. Five years later, in General Recommendation 20 (1992), the Committee again called on States Parties to reconsider standing reservations, which, it argued, were providing a significant barrier to the effective implementation of the treaty. In 1998, in two further comments [made in the context of the reports of its 18<sup>th</sup> and 19<sup>th</sup> sessions], the Committee drew particular attention to reservations to articles 2 and 16, affirming that reservations to these articles were contrary to the object and purpose of the treaty because, according to the Committee: '[they] perpetuate the myth of women's inferiority and reinforce the inequalities in the lives of millions of women throughout the world.'<sup>85</sup>

Since 1998, the Committee has continued to express concern about the consequences of reservations, and has repeatedly urged States Parties to consider their withdrawal. However, with one important exception, the Committee has not provided guidance to States on *how* to go about the task. The exception to this rule is General Recommendation No. 29 on article 16 of the CEDAW, published in 2013, in which the Committee recognises that some States Parties have been able to modify domestic laws as a precursor to lifting reservations to the CEDAW, and usefully urges other States Parties to consider 'the experienc

es of [these] countries' especially those 'with similar religious backgrounds and legal systems'<sup>86</sup> to their own.

As another important example, in its General Comment 24 (1994) the Human Rights Committee attempted to define what should be considered to be contrary to the object and purpose of the ICCPR, and abrogated itself the competence to determine when a reservation does not fulfil this criteria. In the General Comment, the Committee stated that:

*'Reservations must be specific and transparent, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such [...] reservations should not systematically reduce the obligations undertaken only to the presently existing in less demanding standards of domestic law.'*<sup>87</sup>

### Concluding observations

Treaty Bodies regularly use their concluding observations (recommendations) at the end of a periodic review of a State Party's compliance with the relevant treaty, to comment on any reservations that the State may maintain to the treaty or its articles. Generally, Treaty Bodies will focus their comments on the legality of the reservations, by, for example, arguing that they are contrary to the object and purpose of the convention, or are too general and imprecise; and will call on the State Party to specify, limit and/or narrow the scope of any restrictions, and continue efforts to review and ultimately withdraw the reservation(s). Indeed, according to the URG's analysis of Treaty Body concluding observations, simple recommendations to States to withdraw reservations because they are 'contrary to the object and purpose of the convention,' are by far the most common type of observation (42% of all recommendations on religion-based reservations).

On other occasions, a Treaty Body may argue that the wording or existence of a certain reservation suggests that the State Party has wrongly interpreted the relevant treaty provision, and thus recommend that the State reconsider the reservation. For example, commenting on a reservation presented by Malta to the CEDAW, the Committee expressed its concern 'that the State party maintains its reservation to article 16, paragraph 1(e), which according to the Committee might be the result of

a mistaken interpretation of the State party's obligations under this provision.<sup>88</sup>

As noted above, it is debatable how effective these commentaries are as a means of moving States towards a reconsideration of reservations.

What may be more effective (though there is not yet enough evidence to say for sure) is for Treaty Bodies to provide substantive comments explaining why, in its view, the reservation is unnecessary - for example where the Committee feels there is no incompatibility between a given treaty provision and a particular religious belief or practice. Clearly, for that to happen, the Treaty Body in question must contain experts in theology or, for example, Islamic law. However, by engaging in a substantive discussion on the specific right(s) in question, Treaty Bodies are more likely to convince States that any reservation is either unnecessary or could at least be modified/narrowed. From its analysis, the URG found a (relatively small) number of cases where Treaty Bodies have adopted such an approach.

For example, following Qatar's periodic review before the CAT Committee in 2012, the Committee noted:

*'The State party [...] seeks to retain a vague and extremely broad reservation to articles 1 and 16 of the Convention insofar as they are incompatible with the precepts of Islamic law and the Islamic religion. The Committee considers that the State party should face few obstacles in withdrawing its reservation in view of the fact that the State party has accepted and incorporated into domestic law the definition of torture in article 1 of the Convention, as noted in paragraph 8 of the present concluding observations.'*

Similarly, following the periodic review of Jordan before the Committee on the Rights of the Child in 2006, the Committee concluded that the

*'... State's reservation to articles 20 and 21 is unnecessary since there appears to be no contradiction between logic behind it and provisions of articles 20 and 21 of the Convention ... Concerns expressed by State in its reservation are well taken care of by article 20 (3), which expressly recognizes kafalah of Islamic law as alternative care, and article 21 expressly refers to States that 'recognize and/or permit the system of adoption.'*

Another effective, though largely untested, practice is for Treaty Bodies - in addition to providing States with substantive argu-

ments for why a given reservation is not necessary or might be tightened - is to 'encourage' (the use of the word 'encourage' as opposed to, for example, 'calls upon' is important) the State Party to begin a process of national consultation and review, so that these and other arguments can be heard by domestic stakeholders, and support built, for eventual withdrawal.

For example, in its concluding comments on Morocco's combined third and fourth periodic reports, the CEDAW Committee 'encourages' the State Party to:

*'... continue to take the necessary steps for the withdrawal of all its remaining declarations and reservations to articles 2 and 16 to the Convention which, in the opinion of the Committee, go against the object and purpose of the Convention, in order for Moroccan women to benefit from all the Conventions' provisions.'*

Finally, it is likely to be highly effective - indeed this is a key conclusion and recommendation of this Policy Report - for Treaty Bodies to encourage reserving States to review and learn from the experiences of States of similar religious or cultural backgrounds. In other words, when calling on an OIC State to move towards the withdrawal of reservations to the CEDAW, the relevant Treaty Body would be well advised to encourage the concerned State to review - and benefit from - the experience of Morocco or Tunisia (see pages 31 - 32). During its analysis of Treaty Body concluding observations, the URG did find some examples of this kind of recommendations. For example in 2015, the CEDAW Committee recommended to the Maldives that it:

*'Honour its commitment to withdraw [...] its reservation to article 16 (2) within a clear time frame and to review [...] its reservation to article 16 (1), with a view to fully withdrawing it, taking into consideration the practices of countries with similar religious backgrounds and legal systems that have successfully harmonized their national legislation with international human rights obligations and consultations with civil society, in particular women's organizations.'*

Unfortunately, beyond these relatively small number of examples, there are remarkably few examples of Treaty Bodies producing recommendations that provide expert commentary on the substantive justification for a reservation, especially a religion-based reservation; or of Treaty Bodies linking that substantive commentary with a suggestion that the State concerned begin a process of domestic consultation, review, and



reform designed to build a domestic case for withdrawal; or that it reflects on the relevant experiences of other States with similar religious or cultural backgrounds.

## THE UNIVERSAL PERIODIC REVIEW

During the first two cycles of the Universal Periodic Review (UPR), States presented a total of 380 recommendations to States on the issue of reservations to the international human rights conventions; 190 of these (50%) addressed religion-based reservations. The majority of these were focused on religion-based reservations to the CEDAW, the CRC and the ICCPR, (see Figure 9). Most recommendations (71%) call on the State under review to lift religion-based reservations to a particular treaty in a general sense [e.g. 'withdraw your reservations to the CEDAW']; only 29% referenced reservations to particular articles of a treaty.

A URG review of all UPR recommendations about religion-based reservations to the core human rights treaties found that the vast majority (93%) of these recommendations reflect simplistic and rather blunt calls on the State under review to immediately lift the 'offending' reservations.

For example, during the second cycle review of Jordan in 2013, Slovenia offered the following recommendation:

*'Lift the remaining reservations to the Convention on the Elimination of All Forms of Discrimination against Women, as well as the reservations made to the Convention on the Rights of the Child'*

While during the first cycle review of the Maldives in 2010, Spain recommended to:

*'Withdraw reservations to CEDAW.'*

However, as with simplistic concluding observations by Treaty Bodies, there are serious question marks over the effectiveness of this approach. Reservations, especially religion-based reservations, are highly political, and deal with highly sensitive and emotive issues related to religion, culture and tradition. It is extremely doubtful, therefore, that a simple demand, by a State delegation in Geneva, to withdraw a reservation, will have the desired effect. Indeed, by distilling - or even ignoring entirely - complex political and theological questions into a simple demand, such recommendations may even be counter-productive; hardening national positions behind the maintenance of reservations.

That is especially the case when the recommending State is from a different region, or religious-cultural background. According to the URG's analysis, recommendations to withdraw religion-based treaty reservations come predominantly from Western States (46%); while the 'targets' of those recommendations are predominantly OIC States (89%). On the latter point, it is perhaps instructive to compare the UPR reviews of two States - Malta and Bangladesh - which maintain (as of the end of 2016) exactly the same number of reservations (47 - in Malta's case 32 of those are religion-based, in Bangladesh's case that figure is 18) and which have both, over the years, withdrawn only two reservations. Yet over the course of the two cycles of the UPR, Muslim-majority Bangladesh has received twice as many recommendations to withdraw religion-based reservations as has Catholic-majority Malta.

This unfortunate dynamic can be clearly seen in the acceptance rate, by States under review, of recommendations to withdraw treaty reservations. Only 23% of such recommendations were accepted over the UPR's first two cycles. Furthermore, even where such recommendations were accepted, the URG was only able to find evidence that the relevant reservation was subsequently withdrawn in 12% of cases [e.g. Morocco's reservations under the CEDAW, Bangladesh's reservations under the CEDAW, and Syria's reservation under the CRC].

Again mirroring best practice on the part of Treaty Bodies, reviewing States in the UPR would be better advised to both base any recommendation on a detailed, substantive understanding of the situation in the State under review [e.g. regarding which piece of domestic legislation would need to be amended in order for reservation withdrawal to become feasible], and to emphasise the importance, as a precursor to any withdrawal, of the State under review undertaking an inclusive domestic process of consultation, awareness-raising and reform. Such recommendations are more likely to be effective for the simple reason that they are more likely to be 'useful' to the State under review. The URG's 2016 Policy Report reviewing the first two cycles of the UPR found such 'usefulness' to be a key criterion determining the quality and impact of recommendations.<sup>89</sup>

Unfortunately, the URG's analysis of first and second cycle recommendations uncovered few examples of such enlightened recommendations. Some of those are presented below.

*'[Give] due consideration to the recommendations of the Inter-Agency Committee coordinated by the Ministry of Women, Family and Development regarding the compliance of Malaysia with*

*the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women and the withdrawal of its reservations to both conventions.'*

Recommendation by Algeria to Malaysia, 1st UPR cycle, (February, 2009)

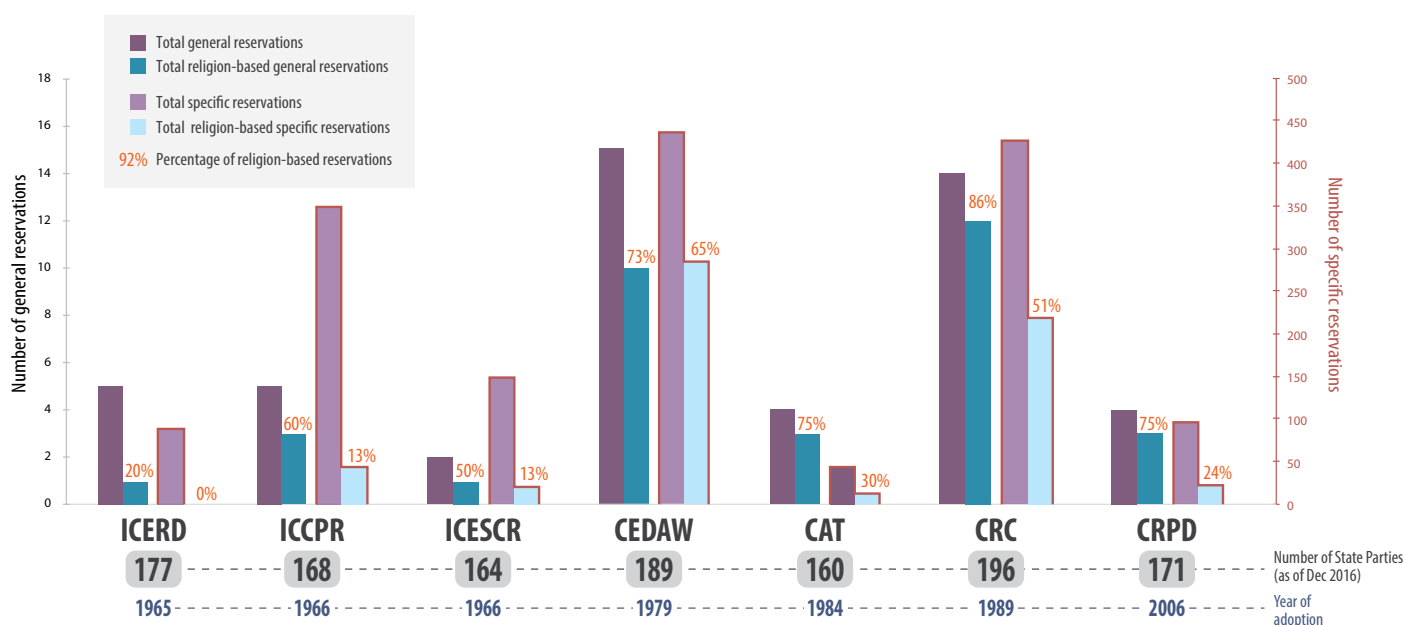
*'Review the personal status legislation and the Penal Code in order to modify or delete articles that discriminate against women, to comply with the Constitution, as well as international law, and work to lift the reservation on article 16 of CEDAW.'*

Recommendation by Sweden to Egypt, 2<sup>nd</sup> UPR cycle, (November, 2014)

*'Achieve real progress with regard to women's rights by reforming the Nationality Act, to ensure gender equality and to give Qatari women the right to transmit their nationality to their children, and by withdrawing reservations to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto.'*

Recommendation by France to Qatar, 2nd UPR cycle, (August, 2014)

FIGURE 9. RECOMMENDATIONS ON RESERVATIONS DURING THE 1<sup>ST</sup> AND 2<sup>ND</sup> CYCLES OF THE UNIVERSAL PERIODIC REVIEW



Data as at September 2016. Source: UPR Info - Database of recommendations. For methodology please see endnote.

## PART IV.

# CONCLUSIONS AND RECOMMENDATIONS

Reservations provide an excellent means of locating the fracture zone between the two moving plates of universal human rights norms, and national/local culture, beliefs and traditions. This Policy Report shows that a significant majority of all reservations (both general and article-specific) are inspired by concern, on the part of the reserving State, that certain provisions of the treaty in question may not be fully compatible with prevailing religious beliefs, doctrine or practices at domestic level. The prevalence of such 'religion-based reservations' in the international human rights system reinforces the commonly-held view that on-going debates about universality and cultural relativism are, to a large extent, debates about the relationship between international human rights norms and religion or belief.

Notwithstanding, this report has also shown that reservations, including religion-based reservations, to the core human rights treaties should not *only* be seen in a negative or static light. On the one hand, it is clearly beyond argument that many reservations, especially sweeping general reservations, have important negative consequences for the on the ground enjoyment of human rights. Yet, on the other hand, as the UN's Human Rights Committee, guardian of one of the two international Covenants, has recognised:

*'The possibility of entering reservations may encourage states which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable states to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that states accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.'*

In other words, reservations can and do play a useful political function - allowing States that may not otherwise do so, to sign and ratify the international human rights treaties, and thus bind

themselves into a comprehensive framework of human rights obligations.

This then underlines the importance, once a State has acceded to a human rights treaty, of leveraging that framework, including its own reservations thereto, to begin, and act as a focal point for, a process of domestic reflection and debate about prevailing societal norms (including religious norms), whether those norms are immutable or can change as society evolves, and whether those evolving societal norms are really incompatible with universal human rights standards. The case studies presented in this Policy Report show that, where such processes of domestic reflection have been initiated, they can achieve important positive results for the human rights of people in the country concerned, and allow the State Party to lift its reservations. Indeed, the statistics compiled for this report show that a number of States, especially OIC member States, have made important progress over recent years in driving domestic reform and lifting religion-based reservations to the core human rights treaties. Taken together with the rising number of treaty ratifications, this emerging pattern of reservation withdrawals, is suggestive of a 'march of universality.'

From the perspective of the international community, the above-mentioned case studies, taken together with a review of the behaviour of UN human rights mechanisms *vis-à-vis* reservations, especially religion-based reservations, points towards the idea that the role of the international community should be to encourage and support such processes of domestic reflection and reform, rather than to engage in top-down demands for the lifting of reservations 'at any cost.'

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## RECOMMENDATIONS

With the above in mind, the Universal Rights Group makes the following recommendations:

### **RECOMMENDATION 1 (STATES)**

All States, developed and developing, including Least Developed Countries (LDCs) and Small Island Developing States (SIDS), should move to sign and ratify all core human rights conventions. Doing so demonstrates an important political commitment to universal human rights norms, and opens the possibility of working with, and receiving technical assistance and capacity-building support from, the UN Treaty Bodies and the wider international human rights system, to gradually bring domestic laws and practices into line with those norms.

### **RECOMMENDATION 2 (STATES)**

Where a political determination to sign and ratify an international human rights treaty is held back by concerns, on the part of some domestic constituencies, about certain provisions of that treaty; the State may consider entering specific (not general or blanket) reservations, providing they are not contrary to the treaty's object and purpose. However, those reservations should clearly and explicitly identify the treaty provisions / obligations affected, and should be accompanied by a clear justification, explaining the domestic situation and rationale behind the reservation. Such justifications are important in order to inform future dialogue between the new State Party and the international community. When drafting reservations and justifications, States should be guided by relevant Treaty Body general comments.

### **RECOMMENDATION 3 (STATES)**

Reserving States should keep reservations under active (re)-consideration. As part of that, States should initiate processes of domestic consultation, reflection and, potentially, reform, that may, over time, render any reservations unnecessary or obsolete.

### **RECOMMENDATION 4 (TREATY BODIES)**

During their interactive dialogues with States Parties, and in their concluding observations, Treaty Bodies should engage in a substantive exchange about the justification of standing reservations, and the relationship between relevant treaty provisions and the contemporary domestic *status quo* as it pertains to issues of religion, belief, culture, or tradition. Based on that exchange, the Treaty Body should build on existing good practice by encouraging and lending support to domestic processes

of consultation, reflection and, potentially, reform; and by referring States Parties to relevant cases studies (e.g. other States Parties that have successfully reviewed and, perhaps, lifted certain reservations).

### **RECOMMENDATION 5 (REVIEWING STATES, UPR)**

Reviewing States under the UPR should avoid simplistic/blunt recommendations to lift reservations, including religion-based reservations, and should instead carefully consider all three UPR reports (national report, UN system report, and other stakeholders report) and tailor recommendations to the prevailing domestic situation and domestic religious or cultural sensitivities. Recommendations may also be more effective if they focus on the process - i.e. calling on the State under review to begin a process of domestic consultations or awareness-raising - rather than solely on the final desired outcome (i.e. lifting of reservations).

### **RECOMMENDATION 6 (NHRIS, NGOS)**

National human rights institutions (NHRIs) and civil society (including NGOs) are well placed to initiate and/or contribute to processes of domestic reflection and awareness raising; using reservations, especially religion-based reservations, as a mutually-agreeable starting point and framework for domestic debate about sensitive religious, cultural and societal issues that may impact on the enjoyment of human rights.

### **RECOMMENDATION 7 (NMIRFS)**

Where States have established national mechanisms for implementation, reporting and follow-up (NMIRFs), these can also play an important role in initiating and framing national debates on sensitive issues that are the subject of reservations to the core human rights treaties. Where NMIRFs wish to take such steps, they should be supported by UN Resident Coordinators and Country Teams (including OHCHR).

### **RECOMMENDATION 8 (MEMBER STATES OF THE HUMAN RIGHTS COUNCIL)**

This report has underscored the importance of States exchanging information and experience, as a useful means moving all States Parties towards a position where they can actively consider lifting reservations. Unfortunately, there are few - if any - platforms at the UN Human Rights Council whereon States can



exchange experience and good practice in this way, or where they can engage in dialogue and cooperation on domestic challenges (including challenges related to religion and human rights) and how to overcome them. Therefore, as part of efforts to reform the delivery of the Council's mandate under agenda item 10, member States should establish inter-sessional platforms, in Geneva and regionally, whereon States and other national stakeholders (especially country-level practitioners) can present national experiences and good practice (e.g. the lifting of reservations, reform of a country's family code) and, where appropriate, can request international support to drive further progress.



# NOTES

## ENDNOTES

- 1 The Global Ethic Institute, University of Tübingen, in collaboration with the Centre for Islamic Theology, Eugen Biser Foundation, Hanns Seidel Foundation, Baden-Württemberg Foundation, and the Weltethos Foundation.
- 2 The Convention on the Protection of All Persons from Enforced Disappearance (CPED) and the Convention on the Rights of Migrant Workers and their Families (CMW) had not received any religion-based reservations at the time of publication of this report).
- 3 International Court of Justice. Advisory opinion of 28 May 1951. Available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=90&case=12&code=ppcg&p3=4>
- 4 Alain Pellet Section 2 Reservations, 1969 Vienna Convention, Article 19 - Formulation of reservations. In Oliver Corten and Pierre Klein..The Vienna Conventions on the Law of treaties - a commentary. Vol. 1. Oxford University Press, 2011.
- 5 UN ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Specific Human Rights Issues: Reservations to Human Rights Treaties, Final Working paper submitted by Ms. Françoise Hampson 4, UN Doc. E/CN.4/Sub.2/2004/42, 19<sup>th</sup> July 2004.
- 6 International Court of Justice. Advisory Opinion, Reservations to the Convention of Genocide., ICJ Report 1951. p. 23. Available at: <http://www.icj-cij.org/docket/files/12/4283.pdf>.
- 7 Human Rights Committee, General Comment 24 [52], General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 1994.
- 8 K.L. McCall-Smith.. Mind the Gaps: The ILC Guide to Practice on Reservations to Human Rights Treaties. International Community Law Review, Vol. 16. 2014, pp. 263-305
- 9 Ibid. See also: Elisabeth Lijnzaad. Reservations to UN-Human Rights Treaties. Ratify and Ruin?, International Studies in Human Rights. Martinus Nijhoff Publishers; The Hague, The Netherlands, 1995.
- 10 Alain Pellet. Reservations to Treaties and the Integrity of Human Rights, Available at: [http://pellet.actu.com/wp-content/uploads/2015/12/PELLET\\_2013\\_Reservations-Integrity-HR-Treaties.pdf](http://pellet.actu.com/wp-content/uploads/2015/12/PELLET_2013_Reservations-Integrity-HR-Treaties.pdf).
- 11 According to the ILC Guidelines (Guideline 1.2), 'Interpretative declarations' are unilateral statements, however phrased or named, made by a State with the purpose of specifying or clarifying the meaning or scope of a treaty, or any of its provisions.
- 12 International Law Commission. Report of the International Law Commission - Add. 1. Guide to Practice on Reservations to Treaties. Doc. A/66/10/Add.1. New York: General Assembly, 2011, Guideline 1.1.
- 13 To determine whether a reservation is in accordance with the object and purpose of the treaty, it must be studied in the light of the relevant treaty's essential elements, its general tenor, the intention of the Parties at the time of negotiating it and whether it disregards the treaty dispute settlement/monitoring body. Object and purpose is determined through an analysis of the whole treaty, particularly its title and preamble. UN Doc. A/66/10/Add.1, 2011.
- 14 International Law Commission. Report of the International Law Commission. Op. Cit.
- 15 Ibid. International Law Commission. ILC Guidelines. Vague or general reservations, guideline 3.1.5.2. General Assembly. UN Doc. A/66/10/Add.1, 2011.
- 16 Ibid.
- 17 Ibid. p. 395.
- 18 Ibid. International Law Commission. ILC Guidelines. Reservations relating to internal law, guideline 3.1.5.5. General Assembly. UN Doc. A/66/10/Add.1, 2011.
- 19 Reservations and the Effective Protection of Human Rights. Goettingen Journal of International Law 2 (2010) 2, 437-462. Johana Fournier, Op. Cit.
- 20 *Belios vs. Switzerland*. European Court of Human Rights. 1988.
- 21 General Comment. Human Rights Committee. General Comment 24. Op. Cit.
- 22 International Law Commission. ILC Guidelines. Op. Cit. Statement of reasons for reservations Guideline 2.1.2. General Assembly. UN Doc. A/66/10/Add, 2011.
- 23 The reservation was to provision 13(2) of the CESC, which reads: 'The states Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:(a) Primary education shall be compulsory and available free to all;(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.  
1. The states Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their

own convictions.

2. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.'

**24** Reservations must be accepted when, given the limited number of parties, the application of the relevant instrument in its entirety is essential condition for their consent; or when the 'treaty is a constituent instrument of an international organisation.' Vienna Convention on the Law of Treaties, Article 20, 23rd May 1969.

**25** Johana Fournier. Op. Cit.

**26** According to the UN Human Rights Committee's General Comment (backed up by some academics), States cannot add further reservations after becoming a Party to the ICCPR, and once withdrawn, a reservation cannot be added again.

**27** Vienna Declaration and Programme of Action, 1993.

**28** On the debate on cultural relativism vs. universal human rights, see C. Pratt.†Canadian Journal of Political Science / Revue Canadienne De Science Politique,†Vol. 23 no. 3, 1990., pp. 628-629. Available at: <http://www.jstor.org.ezproxyegre.uniandes.edu.co:8888/stable/3228694>; R. Cohen. Human Rights and Cultural Relativism: The Need for a New Approach.†American Anthropologist,†Vol. 91 no. 4, 1989, pp. 1014-1017. Available at: <http://www.jstor.org.ezproxyegre.uniandes.edu.co:8888/stable/681598>

**29** UNGA resolution 60/251, Human Rights Council, UN Doc. A/RES/60/251, 3rd April 2006.

**30** Quote by a Western diplomat speaking during a policy dialogue†entitled 'Religion-based and religion related reservations to the main international human rights conventions.' KoÁ University Research Centre for Anatolian Civilizations, Istanbul, 22nd-23rd February, 2015.

**31** Rhona K. M. Smith. Substantive Rights / General Comments. Textbook on International Human Rights. Oxford: Oxford UP, 2003.

**32** Human Rights Committee, *CCPR General Comment No. 24 'Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant'*.†UN Doc. CCPR/C/21/Rev.1/Add.6, 4th November 1994.

**33** Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna. UN Doc. <http://A/CONF.157/23>, 25 June 1993.

**34** UN ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Specific Human Rights Issues: Reservations to Human Rights Treaties, Final Working paper submitted by Ms. FranÁoise Hampson 4, UN Doc. E/CN.4/Sub.2/2004/42, 19<sup>th</sup> July 2004.

**35** For example, the Vatican of Action [25 June 1993]. Adopted by the World ; 16 was classified as a Category 1 reservations.

**36** For example, Malaysia's reservation to Article 2; 7; 14; 28(1a) was classified as a Category 3 reservations.

**37** For example, we counted the Moroccan reservation (now withdrawn) to Article 9(2) of CEDAW where Morocco reserved allowing men and women equality to pass on citizenship as a Category 4 reservation based on religion and tradition. Whether reservations to equal citizenship are required by religion is a heated debate in many Muslim countries (See, for example, the Shadow Report submitted to the CEDAW with regard to Qatar's first report to the CEDAW). Whilst we recognise such debates, States also furnish some religious arguments for these reservations.

This approach is conservative, as it assumes States reserving full articles have intended to reserve all individual provisions under that article. In practice this may not be the case. Given the lack of clarity on this, we view this classification necessary as to avoid underestimating reservations. The present report assumes that unless a State specifies a sub-provision of a human rights treaty, the reservation is for all provisions of a treaty article.

**38** For further information please see the 'methodology section' in endnote.

**39** The Saudi Arabian reservation to the ICERD reads: '[The Government of Saudi Arabia declares that it will] implement the provisions [of the above Convention], providing these do not conflict with the precepts of the Islamic † Shariah.' Available at† : [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec)

**40** Withdrawn on July 2009.

**41** Changed to a specific reservation on 2007.

**42** Withdrawn on April 2009.

**43** Withdrawn on October 1991.

**44** Partially withdrawn on June 2011.

**45** Withdrawn on July 2014.

**46** Withdrawn on March 2012.

**47** Statements on the Reservations to the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. A/53/38/Rev.1, 1998. Available at: [http://www.un.org/womenwatch/daw/cedaw/cdrom\\_cedaw/EN/files/cedaw25years/content/english/Reservations-English.pdf](http://www.un.org/womenwatch/daw/cedaw/cdrom_cedaw/EN/files/cedaw25years/content/english/Reservations-English.pdf).

**48** Objecting States are Germany, the Netherlands, Norway, Austria, Denmark, Finland, France, Greece, Sweden, United Kingdom, Mexico, Belgium, Canada, Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Poland, Portugal, Romania, Slovakia, and Spain.



- 49** Objecting States include the Netherlands, Ireland, Portugal, Germany, Italy, Austria, Denmark, Norway, Finland, Sweden, Slovakia, Belgium, Czech Republic, Latvia, Romania, and Switzerland.
- 50** Article 21 reads: 'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:  
(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;'
- 51** The full reservation reads: 'Article 13 - The Government of Malta declares that it is in favor of upholding the principle affirmed in the words 'and to ensure the religious and moral education of their children in conformity with their own convictions'. However, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic, it is difficult also in view of limited financial and human resources, to provide such education in accordance with a particular religious or moral belief in cases of small groups, which cases are very exceptional in Malta.'
- 52** CEDAW Recommendation 19; CEDAW Recommendation 20; Report of the CEDAW A/53/38/R.1, Statements on Reservations at 47.
- 53** International Law Commission. Report of the International Law Commission. Op.Cit.
- 54** The women's rights advocates' strategy was based on the premise that the Islamic religion is about justice and equality, and that it had preached this principles long-before the West. A regional movement in Maghreb that claimed equality in the legal systems of Morocco, Algeria and Tunisia framed its claims within the cultural and political context of the concerned countries, by focusing on daily matters and the principle of *ijtihad* (living interpretation of Islamic law) to attract public awareness.
- 55** In 1992, Women's Action Union 'launched the One Million Signatures campaign, which aimed to gather a million signatures on a petition to reform the Moudawana. The campaign was highly successful' achieving over one million of signatures supporting the amendment to the family code. Tavaana. Modawana, A peaceful Revolution for Moroccan Women. Available at: [https://tavaana.org/sites/default/files/moudawana\\_en.pdf](https://tavaana.org/sites/default/files/moudawana_en.pdf).
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## METHODOLOGY

The method of counting reservations (and withdrawals) has been to enumerate every provision under each reservation. If a state has reserved a single article, i.e. Article 1, then unless this article has further provisions it has been counted as a single reserved provision. If the article has multiple provisions then each of these provisions has been counted. If a state has specified a particular paragraph under an article, i.e. Article 1(1), then this has been counted as a single reserved provision. If specific provisions have further sub-paragraphs, i.e. 1(2b), then this has also been counted as a single reserved provision.

### Example:

Article 1

1. ....

2.

a. ....

b. ....

c. ....

A reservation to 'Article 1' would be 4 reserved provisions

A reservation to 'Article 1(1)' would be 1 reserved provision

A reservation to 'Article 1(2)' would be 3 reserved provisions

A reservation to 'Article 1(2a)' would be 1 reserved provision

This approach is somewhat conservative as it assumes states reserving full articles have intended to reserve all individual provisions under that article. In practice this may not be the case, however it is deemed necessary to avoid underestimating reservations.

General Reservations to the entire treaty have been counted as a separate type of reservation, and not as all provisions under the respected treaty.





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